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No. 02-___

In the
Supreme Court of the United States
October Term, 2002

ESTATE of SHANE G. SORRELLS, By and Through Its Independent Executrix, Sheryl Thostenson, Dana Fontenot, as Next Friend of CHANDLER SORRELLS, a Minor, PAT SORRELLS, and RITA SORRELLS,
Petitioners,

vs.

CITY of DALLAS, JOSEPH CUTRONA, WILLIAM READDY, and STANLEY GRIFFIS,
Respondents.

On Petition For a Writ Of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In an "excessive force," civil rights action, to survive a municipality's motion for summary judgment, a plaintiff must adduce evidence sufficient to raise a genuine issue of material fact as to three elements, namely: (1) that a policymaker; (2) acting pursuant to an official policy; (3) violated the plaintiff's constitutional rights.

At issue here is only one element: policy. Petitioners sought below to raise a fact issue regarding whether a City of Dallas policy was the moving force behind their injuries.

Plaintiffs present two questions pertaining to whether the U.S. Court of Appeals for the Fifth Circuit erred in holding that Plaintiffs failed to meet their burden regarding this element under Rule 56, namely:

1. Does a Police Chief's Adoption of the Findings and Recommendations of a Fair and Full Internal Affairs Investigation into an Officer's Conduct Constitute a Ratification of that Conduct?

2. Does a Police Chief's Adoption of the Findings and Recommendations of a Fair and Full Internal Affairs Investigation into an Officer's Conduct Constitute a Policy Statement Regarding that Conduct?

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PETITION FOR WRIT OF CERTIORARI

The Estate of Shane G. Sorrells, by and through its Independent Executrix, Sheryl Thostenson, Dana Fontenot, as Next Friend of Chandler Sorrells, a Minor, Pat Sorrells, and Rita Sorrells (sometimes collectively "Petitioners") respectfully petition the Supreme Court to issue a Writ of Certiorari to review the opinion of the U.S. Court of Appeals for the Fifth Circuit, which opinion that court issued on July 10, 2002.

OPINION BELOW

Petitioners attach the Fifth Circuit's opinion as Appendix Exhibit A. (App. 1-10.)

JURISDICTION

Petitioners invoke this Court's certiorari jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2101(c). Petitioners attach relevant, statutory provisions regarding jurisdiction as Appendix Exhibit B. (App. 11.)

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

Petitioners reference these constitutional provisions: United States Constitution, Amendments I, V, VIII, and XIV, § 1. Petitioners reference these statutory provisions: 42 U.S.C. § 1983. Petitioners attach the relevant constitutional and statutory provisions as Appendix Exhibit C. (App. 12-13.)

STATEMENT OF THE CASE

A. Undisputed Facts.

1. The Incident.

For purposes of Petitioners' application for a writ of certiorari, the following facts are not disputed, as they are the facts upon which the Fifth Circuit premised its decision.

In September of 1998, the Dallas Police Department ("DPD") dispatched two officers to an apartment complex in Dallas, Texas. The officers were Senior Corporal Joseph Cutrona ("Officer Cutrona") and Officer William Readdy ("Officer Readdy"). They were investigating a report of indecent exposure. The initial report had located the event in the alley behind the apartment complex; both sides of the alley were lined with apartment complexes. (App. A-2, 22, 38.)

Upon arrival, the officers parked their car behind that of Shane G. Sorrells ("Mr. Sorrells"), who was parked in his car, high on cocaine, nude, masturbating, and disoriented. His car faced a brick building. Accordingly, once the officers parked behind him, he could not move his car. The officers told Mr. Sorrells to get out of his car; he was non-responsive and continued in his activity. The officers then called for backup. While waiting for backup, the officers attempted to force Mr. Sorrells out by spraying Oleoresin Capsicum spray ("OC Spray") through the car's air vents.[1] (A-2, 28-29, 38.)

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[1] OC Spray, also known as pepper spray or pepper mace, is a chemical agent made from hot pepper extracts. The active ingredient, capsicum, is an inflammatory agent. Exposure to OC Spray irritates the mucous membranes of the eyes, nose, throat, and lungs. It also causes dilation of the capillaries, which inhibits the ability to breathe. (A-2, n.1.)

Mr. Sorrells remained nude, nonresponsive, and masturbating. (A-2, 22, 29, 38.)

Around this time, Sergeant Stanley Griffis ("Sergeant Griffis") arrived. He used a metal baton (called an "ASP") to break the front passenger side window of Mr. Sorrells' car, which caused glass to fly through the car and cut Mr. Sorrells' exposed skin. Mr. Sorrells began to bleed profusely. He remained nonresponsive, seemingly unaware of the events unfolding about him and continuing to masturbate. (A-3, 26-28, 30, 38.)

Sergeant Griffis and Officer Cutrona next tried using more OC Spray, spraying it through the broken window directly onto Mr. Sorrells. Sergeant Griffis emptied an entire canister of OC Spray into the car. Mr. Sorrells remained oblivious and masturbating. (A-3, 26-30.)

Officer Cutrona next unlocked the driver-side car door and attempted to pull Mr. Sorrells out. Because Mr. Sorrells was covered with blood and sweat, however, Officer Cutrona could not get a firm grasp; Mr. Sorrells fell to his side on the ground, where he remained nonresponsive. He continued to masturbate. (A-3, 26-30.)

Shortly thereafter, three more officers arrived on the scene. A one-sided struggle ensued in which the officers attempted to handcuff Mr. Sorrells, while he continued in his trancelike state, masturbating. One of the officers struck Mr. Sorrells "between 25 and 30 times" with a baton. The undisputed evidence includes evidence that, during this struggle, the officers hit and kicked Mr. Sorrells. Mr. Sorrells finally rose up and began to move (at whatever rate of speed) across the alley into another, enclosed parking lot. He continued to masturbate as he moved. (A-3, 22-38.)

At this point, Officer Readdy attempted to apply a Lateral Vascular Neck Restraint ("LVNR" or "chokehold").[2] Because Mr. Sorrells was nude, oily (from the OC Spray), and continually masturbating, Officer Readdy could not properly maintain the LVNR. Officer Readdy administered the LVNR so poorly that he actually hung around Mr. Sorrells' neck with his feet off the ground. Officer Readdy and the other officers ultimately brought Mr. Sorrells to the ground. Officer Readdy did not release the LVNR when Mr. Sorrells came to the ground, but, rather, continued to hang on to him, appearing "winded." (A-3, 32-38.)

The officers then forced Mr. Sorrells onto his stomach, at which point he gasped that he could not breathe. Although some of the officers heard his cry; others did not. No one on the scene – officers or paramedics – applied CPR. Mr. Sorrells lost consciousness, stopped breathing, and died. An autopsy revealed that he had suffered a crushed larynx and the coroner ruled his death a homicide. (A-3, 32-38.)

2. Police Chief Bolton's Decision.

Pursuant to its policies and procedures, the DPD Internal Affairs Division ("IA") investigated this incident. The IA investigation lasted nearly a year and included interviews with numerous witnesses, both police and civilian. At issue were, among other things, the appropriateness of the force used and its escalation, the OC Spray, and the LVNR. (A-22, 23, 39; *see generally* A-22-38.)

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[2] An LVNR is a neck restraint ostensibly involving a rear head lock and compression on the "lateral" veins until the subject complies or loses consciousness. Obviously, on a struggling individual, it would be somewhat difficult – if not impossible – to avoid putting compression across the windpipe. For example, here, the officer crushed Mr. Sorrells' windpipe. (A-3, n.2.)

Mr. Sorrells' condition was a factor. DPD policy places limitations on the use of OC Spray and LVNRs in conjunction with each other (as well as limitations on the use of either) when the subject is displaying what the DPD terms "Drug-Induced Psychosis/Excited Delirium." IA further investigated the reports by civilians that the officers had kicked Mr. Sorrells. (A-14-21, 27-31.)

Guiding IA were the longstanding (since 1995) DPD policies and procedures regarding the use of force, the use of deadly force, the use of OC Spray, the use of LVNRs, and their combined use on individuals displaying Drug-Induced Psychosis/Excited Delirium. Upon the IA investigation's conclusion, IA tendered its report (the "IA Report") and its recommendations to Police Chief Terrell Bolton ("Police Chief Bolton"). The IA Report detailed all of the evidence IA had collected and the conclusions IA drew from the evidence. (A-14-39 (DPD policies and IA Report.)

The IA Report enumerated only one DPD policy as being applicable to the incident, namely, DPD Code of Conduct, § 4.10. Section 4.10 provides: "Officers shall not use any unnecessary or inappropriate force against any person." IA did not address any of the DPD policies and procedures regarding the use of OC Spray, the use of an LVNR, the escalation of force, and the escalation and use of deadly force, which – by their terms – appeared to prohibit the officers' conduct. (A-26; *see*, *e.g.*, A-17 ("The LVNR will not be used on subjects who are using techniques of non-cooperation and not posing a physical threat to anyone.").)

IA concluded that only one officer (Officer Cutrona) violated any DPD policy or procedure (Code of Conduct, § 4.10), in only one instance (allegedly standing on Mr. Sorrells' back). IA accordingly recommended to Police Chief Bolton that the DPD discipline only Officer Cutrona for this one instance of conduct; IA did recommend, further,

verbal counseling of Sergeant Griffis by one of his superiors for having emptied an entire canister of OC Spray on Mr. Sorrells. (A-38, 39.)

Police Chief Bolton adopted all of IA's findings but only one of its recommendations, as his signature evidences. Police Chief Bolton declined to accept IA's recommendation that Sergeant Griffis be counseled. (A-39.)

The City of Dallas has delegated policymaking authority to the Police Chief and/or Police Department under Chapter XII (Creation of Police Department) of the Dallas City Charter, which provides that the Police Chief is the "head" of the DPD and further that he shall:

> have immediate direction and control of the police department, subject to the supervision of the city manager, and also subject to such rules, regulations, and orders as the city manager may prescribe, not inconsistent with the ordinances of the city, *and shall promulgate all orders, rules, and regulations for government of the police force.*

(City Charter, Chapter XII, § 2.(1)); *see also City of St. Louis v. Prapotnik*, 485 U.S. 112, 118, 108 S. Ct. 915, 928 (1988) (the question of who is the policymaker is one of state law).

Thus, and as is evidenced by his signature on the IA Report, Police Chief Bolton – the highest ranking and final authority for matters of DPD, and therefore Dallas, police procedures and policies, adopted the findings and recommendations of IA and, accordingly, exonerated *all* officers involved except Officer Cutrona. Furthermore, and as to Officer Cutrona, Police Chief Bolton found only a single violation of the DPD's excessive force policies, namely, Officer Cutrona's alleged "standing" on Mr. Sorrells' back. (A-39.)

B. Procedural History.

Plaintiffs filed sued the officers involved in the incident and the City of Dallas under 42 U.S.C.§ 1983 for violations of Mr. Sorrells' civil rights, including his rights to be from unconstitutional "excessive force," and to be protected by the police when an officer is inflicting excessive force on his person. (A-4.)

All of the defendants moved for summary judgment. The District Court found that fact questions precluded summary judgment as to three officers, but granted summary judgment as to all other defendants, including the City of Dallas. As to the City of Dallas, the District Court found Plaintiffs had adduced "no evidence" of a policy or procedure. (A-4.)

Plaintiffs appealed, as well as the three officers whom the District Court had denied qualified immunity. The Fifth Circuit affirmed the District Court's decision in all respects. At issue here is the propriety of the Fifth Circuit's holding that Plaintiffs adduced insufficient evidence, as a matter of law, under Fed. R. Civ. P. 56, to raise genuine issues of material fact regarding the existence of a policy or procedure that violated Mr. Sorrells' constitutional rights.

REASONS FOR GRANTING THE WRIT

A. Does a Police Chief's Adoption of the Findings and Recommendations of a Fair and Full Internal Affairs Investigation into an Officer's Conduct Constitute a Ratification of that Conduct?

Every substantial law enforcement authority has an IA division – counties do as to their Sheriff's Departments and cities do as to their Police Departments. Governmental entities maintain IA divisions for a variety of reasons, such as to: (1) maintain integrity of internal conduct; (2) maintain

an appropriate balance of the exercise of police power *vis-à-vis* private citizen's rights of autonomy; and (3) ensure compliance with all policies, practices, and procedures the governmental entity deems significant and worthy of enforcement. These issues, however, are *internal* to the governmental department. Review of the Fifth Circuit's decision is important, here, because citizens require guidance from this Court regarding the *external* significance of the results of an IA findings, recommendations, and reports – to what extent to they effect the relationship between the citizen and the state?

It is black letter law that a municipality is liable under § 1983 for a deprivation of rights protected by the Constitution or federal laws inflicted pursuant to official policy. *See, e.g., Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984) (*per curiam*), *cert. denied*, 472 U.S. 1016, 105 S. Ct. 3476 (1985). And not every governmental employee's act can be considered an act that creates or represents official policy for it is likewise black letter law that mere *respondeat superior* evidence is insufficient to support a claim under § 1983. *See, e.g., Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2027 (1978). The actor must be a policy-maker. For purposes of this petition, Police Chief Bolton *is* a policy-maker. The only issue here is, when are his acts "policy" that bind the City of Dallas?

An "official policy" is [. . . ,] "[i]f written, a policy statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority. *Slidell*, 735 F.2d at 862.

In addition to being created by "official adoption and promulgation," a policy can exist, further, by virtue of ratification. "Ratification" generally means "the adoption, confirmation or failure to repudiate prior unlawful acts which were not legally binding at a time when the defendant

had the right and knowledge of facts necessary to repudiate such conduct[.]" *See, e.g., Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649, 653 (5th Cir. 1994).[3]

As this Court quoted in *City of Oklahoma City v. Tuttle*:

> As a general rule, the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*; it must further appear, that they were expressly authorized to do the acts, by the city government, or that they were done *bona fide* in pursuance of a general authority to act for the city, on the subject to which they relate; or that, in either case, the act was adopted and ratified by the corporation.

Id., 401 U.S. 808, 819, 105 S. Ct. 2427, 2434 (1985) (quoting *Thayer v. Boston*, 36 Mass. 511, 516-517 (1837)).

The important question that Petitioners bring to the Court's attention is, what is the legal effect of a Dallas Police Chief's decisions in connection with an IA investigation? In particular, to what extent, if any, does his decision to adopt the findings and recommendations of the IA Report constitute an official policy statement?

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[3] Petitioners cite Texas law because, if state law controls *who* is the policymaker, it would seem that state law controls *how* a policymaker ratifies. Petitioners respectfully contend, however, that the law on ratification is generally the same everywhere. *See generally, City of St. Louis v. Prapotnik*, 485 U.S. at 127, 108 S. Ct. at 926.

The process common to many municipalities across America works just as it does in Dallas:

(1) the City of Dallas delegated its authority to draft and enforce DPD policies and procedures to the discretion of Police Chief Bolton;
(2) Police Chief Bolton delegated his authority to conduct an investigation into his officers' conduct to the IA division;
(3) The IA division fairly and fully conducted that investigation, compared the officers' conduct to the existing, written DPD policies and procedures, and ported its findings and recommendations to Police Chief Bolton;
(4) Police Chief Bolton reviewed the IA report, acting in his discretion as the highest-ranking Dallas lawmaker on these issues, accepted IA's recommendation that the officers' conduct was within Dallas policies and procedures, except for a single act by Officer Cutrona.

(A-15, 16, 38-39.) When Police Chief Bolton adopted the findings and recommendations of IA, he expressly determined that the acts of the officers involved in the incident *conformed with DPD policies, practices, and procedures*.

Police Chief Bolton acted within his authority and his acts must have meaning. He determined that, given the facts presented (as he understood them), the conduct of the investigated officers was within the parameters of DPD's policies and procedures. Thus, he "ratified" these officers' conduct – he has told other officers and the public, effectively, "What these officers did, on these facts, is consistent with this Department's policies and procedures."

Once the Police Chief has adopted findings and recommendations that exonerate officers in a particular

incident, the fact pattern in question becomes an exemplar that both the police and the public can reference to determine the concrete meaning of more abstractly stated policies and procedures. Thus, these adopted findings and recommendations become a part of the official policies and procedures in the same way that judicial interpretations of particular fact patterns form "the law" with respect to a particular rule of law or statute.

Chief Bolton therefore has determined that DPD policies and procedures are inclusive of the following scenario: when officers come upon a clearly delusional, non-responsive, and/or semi-conscious individual, in a car that can neither move forward nor backward, they can smash the windows out, cut the occupant with flying glass, douse him with a full canister of OC Spray, pull him from his car, beat him extensively although he remains non-responsive, administer a chokehold that crushes his larynx, place him in a prone position, ignore or fail to be attentive to his cries that he cannot breathe, and, when they finally notice he has turned blue, decline to administer CPR.

And they can do so even though DPD *written* policies appear to suggest that they cannot! (A-14, 15-22.)

The Fifth Circuit rejected Mr. Sorrells' appeal, concluding that no fact issue had been raised about whether Dallas maintained a policy permitting the conduct at issue. The Fifth Circuit concluded that no ratification could have occurred here, not because Police Chief Bolton did not have the power to ratify, but, because "the incident was single and isolated." The Court wrote, "Were we to hold Dallas liable in such a situation, we would be holding the city liable not for what its policy says, but for what Bolton interpreted that policy to require in a single-isolated incident." (A-9, 10.)

That reasoning clearly is wrong and its expression in the form of a court of appeals' written, albeit *per curiam*,

opinion is actively hurtful both to Mr. Sorrells' surviving family and American jurisprudence, in general. And the flaw in its reasoning is easily exemplified.

Suppose – prior to the occurrence of the incident at issue here – DPD had amplified its policies and procedures the same way that the *Restatements* do – with specific illustrations. And suppose one of those illustrations tracks the facts that transpired here.

Now, suppose the events involving Mr. Sorrells' occur and his family files a lawsuit. If the lawsuit went on appeal, and the Fifth Circuit were called upon to interpret the similar, DPD illustration, there could be no question that – in creating the "illustration of" its policies and procedures – the DPD had made a policy statement.

Under such circumstances, were the Fifth Circuit nevertheless to observe that, not withstanding the comment or illustration, this lawsuit involved but "a single isolated incident," the observation would be bizarre.

In other words, the singularity of the event cannot be the dispositive factor. Whether a rule is promulgated by case-by-case ratification, or pre-existing hypothetical, is irrelevant to whether the rule is an official policy. What is relevant is not when the illustration of the policy was recognized, but the determination that the particular illustration is within the rule.

In sum, the Fifth Circuit's opinion is in error; Petitioners' evidence of ratification is sufficient to raise a genuine issue of material fact as to whether Dallas may be held liable for the officers' conduct under a theory of ratification. Wielding his delegated "exclusive" authority as to administrative and personnel matters, Police Chief Bolton carefully and consciously reviewed the IA Report, IA's recommendations, the chain of command personnel's

recommendations, entered modifications as to discipline of his own, and then exonerated all of the officers involved and disciplined Officer Cutrona *only* for "standing on [Mr. Sorrells'] back." Police Chief Bolton utterly failed to repudiate any of the officers' conduct other than that of Officer Cutrona as to this narrow limited issue.

This evidence is sufficient to raise a genuine issue of material fact as to ratification. *See, e.g., City of St. Louis v. Prapotnik*, 485 U.S. at 127, 108 S. Ct. at 926 ("If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because the decision is final."), *Hyland v. Wonder*, 117 F.3^{d} 405, 414 (9th Cir. 1997), *op. amended & reh'g denied*, 127 F.3^{d} 1135 (1997), *cert. denied*, 522 U.S. 148, 118 S. Ct. 1166 (1998), *David v. City and County of Denver*, 101 F.3^{d} 1344, 1358 (10th Cir. 1996), *cert. denied*, 522 U.S. 858, 118 S. Ct. 157 (1997), and *Skevofilax v. Quigley*, 586 F. Supp. 532, 544 (D. N.J. 1984) ("Where a municipality's procedure of reprimand is so inadequate as to ratify unconstitutional conduct, the municipality may be liable under § 1983."); *cf. Torres v. Kuzniasz*, 936 F. Supp. 1201, 1206 (D. N.J. 1996) (IA investigation reports held discoverable because they are evidence of municipal policy or custom), and *Tyner v. City of Jackson*, 105 F.R.D. 564, 566 (S.D. Miss. 1985) (same).

B. Does a Police Chief's Adoption of the Findings and Recommendations of a Fair and Full Internal Affairs Investigation into an Officer's Conduct Constitute a Policy Statement Regarding that Conduct?

The Fifth Circuit has taken the position, here, that a single, isolated instance of a decision can never be a statement of policy. Setting aside the *post* nature of ratification (*i.e.*, it always occurs after an event), a separate

flaw in the Fifth Circuit's logic requires addressing because it dovetails into the ratification argument.

A final policymaker's adoption of a course of action "'tailored to a particular situation and not intended to control decisions in later situations' may, in some circumstances, give rise to municipal liability under § 1983." *Brown v. Bryan Co.*, 219 F.3d 450, 459 (5th Cir. 2000) ("*Brown II*") (citing *Brown v. Bryan County*, 520 U.S. 397, 406, 117 S. Ct. 1382, 1389 (1997) ("*Brown I*"), and *Pembaur v. Cincinnati*, 475 U.S. 469, 481, 106 S. Ct. 1292, 1299 (1986)), *cert. denied*, 532 U.S. 1007, 121 S. Ct. 1734 (2001).

This description of the law does not mean, necessarily, "ratification." An after-the-fact interpretation of a law is a retrospective examination of what the law meant at that earlier time. The Fifth Circuit hit an intellectual stumbling block when it noted that the very policies and procedures that Police Chief Bolton determined *had been met* appear – on their face – to have been contrary to the officers' action. (A-9 ("In fact, if anything, the Sorrells Family put forth evidence that Dallas has formal written policies designed to protect arrestees in these types of situations.").)

But, the very reason that Petitioners put the policies into evidence is to demonstrate the significance of Police Chief Bolton's decision – and the danger in allowing such decisions to continue. DPD's policies and procedures would seem to require a finding that the officers' conduct here was outside municipal policy and wrongful. Yet, Police Chief Bolton determined that none of these policies and procedures was violated.

The message his decision sends is this: the law is what I say it is. Police officers, given such guidance, have no incentive to follow rules that, once broken, are ignored. If Police Chief Bolton wants to determine that his officers can

violate his rules without consequence, that is his decision. And, if the City of Dallas wants to leave Police Chief Bolton in office, it assumes the risks of liability inherent in its delegation of police authority to him.

Police Chief Bolton's exoneration of the officers, given the facts here, means that – as he understands DPD policies and procedures – what the officers did is proper and *consistent with the policies and procedures as they stood at the time of the incident*. Thus, separate and apart from ratification, Petitioners raised a fact issue about whether the City of Dallas had in place DPD policies and procedures consistent with constitutional limitations.

The implications of such a scenario are, of course, enormous. If the Court accepts Petitioners' arguments, then municipalities across the country must re-address the degree to which they delegate "internal affairs" decision making to police departments. This is not to say, however, that every time IA exonerates an officer and "guesses wrong" – *i.e.*, a court later determines that his conduct was unconstitutional – the city is going to have to pay.

For example, assume that a police officer is accused of beating an arrestee. Assume further that the investigation results in two statements from equally credible sources; one witness says he saw the officer beat the arrestee with his fists, the other says he saw the incident and the officer did not beat the arrestee at all, but, rather, used his hands to push the arrestee into the back seat of the patrol car. The IA investigation concludes with a recommendation that the officer be exonerated; the police chief signs off on that recommendation.

In such an instance, Plaintiffs would contend that – *ceteris paribus* – in exonerating the officer, the city has not concluded (by and through the police chief's approval) that whatever this officer did was within its policies. Rather, the

city has concluded that an officer who uses reasonable force to push an arrestee into the back seat of a patrol car has acted within its policies and procedures regarding appropriate use of force in connection with an arrest. If, later, a third witness appears with a videotape of the officer beating the arrestee, the situation does not change – the city's pronouncement went only to the facts as it knew them compared to the policies as written.

CONCLUSION

Petitioners are not asking the Court to grant a writ of certiorari to write new law but, rather, to interpret the meaning of current law in a particular, but common, scenario – what is the legal significance of an IA report (containing findings and recommendations) adopted by a Police Chief. Because this scenario is a frequent one, the issue is one of importance and worthy of this Court's attention.

Respectfully Submitted,

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CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10610

ESTATE OF SHANE G. SORRELLS, Etc.; Et al., Plaintiffs,

ESTATE OF SHANE G. SORRELLS by and through its independent executrix Sheryl Thostenson; DANA FONTENOT, as next friend of Chandler Sorrells, a Minor; PAT SORRELLS; RITA SORRELLS, Plaintiffs-Appellees-Appellants,

versus

CITY OF DALLAS; Et al., Defendants

CITY OF DALLAS, Defendant-Appellee

JOSEPH CUTRONA, Officer
WILLIAM READDY, Officer
STANLEY GRIFFIS, Sergeant Defendants-Appellants-Appellees.

Appeals from the United States District Court
for the Northern District of Texas
(99-CV-1185)

Before DAVIS, EMILIO M. GARZA, AND STEWART,
Circuit Judges

PER CURIAM:*

Joseph Cutrona ("Cutrona"), William Readdy ("Readdy"), and Stanley Griffis ("Griffis") (collectively, the "Officers") appeal from the district court's denial of qualified and official immunity from the plaintiffs' § 1983 and state law claims. The estate of Shane G. Sorrells and various statutory heirs of Shane G. Sorrells (collectively, the "Sorrells Family") cross-appeal from the grant of summary judgment in favor of the City of Dallas ("Dallas"). For the reasons set forth below, we AFFIRM.

FACTUAL AND PROCEDURAL HISTORY

In the Fall of 1998, Officers Cutrona and Readdy were dispatched to an apartment complex to investigate a report of indecent exposure. Upon their arrival, they witnessed Shane G. Sorrells ("Sorrells"), nude and masturbating in the front seat of his car. Cutrona and Readdy told the suspect to get out of his locked car, he failed to respond. The officers then called for backup. According to the Sorrells Family, Sorrells did not exhibit any violent behavior or attempt to flee. Nevertheless, Cutrona and Readdy decided to use Oleoresin Capsicum ("OC") spray[1] to force Sorrells out of his vehicle. Sorrells

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*Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4

[1]OC spray, also known as pepper spray or pepper mace, is a chemical agent made from hot pepper extracts. The active ingredient, capsicum, is an inflammatory agent. Exposure to OC Spray irritates the mucous membranes of the eyes, nose, throat, and lungs. It also causes dilation of the capillaries, which inhibits the ability to breathe.

continued to masturbate and remained in his vehicle. Around this time, Sergeant Griffis arrived. Griffis used an ASP baton to break the passenger-side window of the car. Sorrells was injured by pieces of flying glass and began to bleed. Cutrona and Griffis then used more OS spray on Sorrells, but he refused to exit the vehicle. At this point, Cutrona unlocked the car and attempted to pull Sorrells from the vehicle. However, because Sorrells was sweating. Cutrona could not get a firm grasp on him. Cutrona and Readdy were eventually able to remove Sorrells from the car and get him to the ground. Shortly thereafter, three more officers arrived on the scene. A struggle ensued when the officers attempted to handcuff Sorrells. According to the Sorrells Family, and a civilian witness, one of the officers struck Sorrells "between 25 and 30 times" with a baton while another officer applied a Lateral Vascular Neck Restraint ("LVNR"),[2] which is used to subdue struggling individuals. Cutrona admits that he struck Sorrells twice on the right arm with a baton after he refused a verbal command to put his arm behind his back. However, Cutrona denies that he used the extent of force alleged by the Sorrells Family. Eventually, Sorrells either began to slowly walk away (according to the Sorrells Family) or to violently escape (according to the Officers). Readdy apprehended Sorrells and brought him to the ground by use of a LVNR. Cutrona, with the assistance of the newly-arrived officers, handcuffed Sorrells. At some point during this ordeal, Sorrells lost consciousness and stopped breathing. Paramedics administered CPR at the scene and transported Sorrells to Parkland Memorial Hospital. Despite

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[2]An LVNR is a neck restraint involving a rear head lock and compression until conscious compliance or unconsciousness. The Sorrells Family maintains that the LVNR is essentially a chokehold. The Officers deny that a chokehold was used on Sorrells.

efforts to revive him, he was pronounced dead upon arrival. An autopsy revealed that Sorrells suffered a crushed larynx. The coroner ruled his death a homicide.

The Sorrells Family filed suit against Dallas, the Officers, and several other individuals including certain supervisory officials and on the on-scene paramedics. They alleged excessive force and failure-to-protect violations pursuant to 42 U.S.C. §§ 1983 and 1985, and various state law causes of action, including violations of the Texas Tort Claims Act, assault, battery, false imprisonment, intentional infliction of emotional distress, and negligence. The defendants moved for summary judgment on all of the claims. The relevant arguments were that (1) the Officers were entitled to qualified and official immunity and (2) there was no basis for municipal liability against Dallas. The magistrate judge recommended that the motion for summary judgment be denied as to the claims of excessive force, failure-to-protect, and state law causes of action against the Officers, and be granted in favor of Dallas and the other individual defendants. The district court adopted the magistrage judge's findings and recommendation. The Officers appeal from the denial of qualified and official immunity. The Sorrells Family cross-appeals from the grant of summary judgment in favor of Dallas.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. Price v. Roark, 256 F.3d 364, 368 (5th Cir. 2001). A denial of a motion for summary judgment based on a claim of qualified immunity is also reviewed *de novo*. Blackwell v. Barton, 134 F.3d 298, 301 (5th Cir. 1994). The issue of whether a right is clearly established is typically treated as a question of law. Pfannstiel v. City of Marion, 918 F.2d 1178, 1183 (5th Cir. 1990). Likewise, the question of the objective reasonableness

of the Officers' conduct is also a question of law. Mangieri v. Clifton, 29 F.3d 1012, 1015-16 (5th Cir. 1994). Questions of law are reviewed *de novo*. United States v. Urias-Escobar, 281 F.3d 165, 166 (5th Cir. 2002). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED R.CIV.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

DISCUSSION

There are three main issues on appeal. First, whether the district court erred in failing to grant the Officers qualified immunity from the excessive force and failure to protect claims under § 1983. Second, whether the Officers are entitled to official immunity on the state law claims. Finally, whether the district court erred in granting summary judgment to Dallas based on its finding that no city policy or custom caused Sorrells's injury.

I. Qualified Immunity

To determine whether a government official is entitled to qualified immunity from liability under 42 U.S.C. § 1983, a two step analysis is undertaken. Hayter v. Mt. Vernon, 154 F.3d 269, 274 (5th Cir. 1998). The first step is to determine whether the plaintiff has alleged a violation of a clearly established constitutional right. Hare v. City of Corinth, Miss., 135 F.3d 320, 325 (5th Cir. 1998). "The second prong of the qualified immunity test is better understood as two separate inquiries: whether the allegedly violated constitutional rights were *clearly established at the time of the incident*; and, if so,

whether the conduct of the defendants was objectively unreasonable in the light of that then clearly established law." Id. at 326 (emphasis in original).

Excessive force claims are analyzed under the rubric of the Fourth Amendment. Johnson v. Morel, 876 F.2d 477, 479 (5th Cir. 1989). At the time of the incident, a plaintiff wishing to establish an excessive force claim had to show that: (1) he suffered a significant injury, (2) resulting directly and only from the use of force that was clearly excessive to the need, and (3) the force used was objectively unreasonable. Id. at 480. A court must view the totality of circumstances from the standpoint of a reasonable officer on the scene, paying particular attention to "whether the suspect pose[d] an immediate threat to the safety of the officers or others." Stroik v. Ponseti, 35 F.3d 155, 158 (5th Cir. 1994).

The failure to protect a suspect from the use of excessive force by others can give rise to liability under § 1983. Hale v. Townley, 45 F.3d 914, 919 (5th Cir. 1995).

The district court correctly concluded that a genuine issue of material fact existed as to whether the Officers used excessive force and failed to protect Sorrells from the use of excessive force by their comrades. The Sorrells Family adduced considerable evidence controverting the Officers' version of the events. Specifically, there is evidence in the record supporting the view that Sorrells was not a threat to anyone. First, Police Detective Joe Decorte admitted this fact to members of the Sorrells Family. Further, civilian witnesses testified that the Officers continued to kick and hit Sorrells after he was immobilized and that Sorrells did not resist or fight back. These witnesses further explained that Sorrells was repeatedly struck despite the fact that he was not struggling or fighting. Moreover, there is civilian witness testimony in the record verifying that Sorrells merely stumbled off, and did not try to flee, negating the notion that force was needed to limit

the risk of flight. This witness also testified that Readdy leapt onto Sorrell's back and was choking him as Sorrells "tiptoed" away. While the Officers vigorously dispute the account of the incident as portrayed by the civilian witnesses and the Sorrells Family, the district court correctly concluded that there are too many disputed facts regarding the amount of force used, and the necessity of the escalating violence, to permit resolution of this case by way of summary judgment. Moreover, the same facts that give rise to a genuine issue of material fact as to whether the Officers used excessive force, give rise to a genuine issue of material fact as to whether the Officers failed to protect Sorrells.

II. Immunity from the State Law Claims

The Officers assert two separate grounds of immunity from the Sorrells Family's state law claims.

A. Official Immunity

"Texas' law of qualified or official immunity is substantially the same as federal immunity law." Cantu v. Rocha, 77 F.3d 795, 809 (5th Cir. 1996) (citing City of Lancaster v. Chambers, 883 S.W.2d 650, 656 (Tex. 1994)). "There is, however, one important difference. Summary judgment is not appropriate, as it is in the federal system, simply on a showing that the right alleged to have been violated was not clearly established." Id. at 808-09 (citing City of Lancaster, 833 S.W.2d at 657). Texas's test for official immunity focuses solely on the objective legal reasonableness of the officer's conduct. Id. (citing City of Lancaster, 833 S.W.2d at 656-57).

We agree with the district court that the same fact issues that preclude summary judgment on the § 1983 claim,

preclude granting official immunity on the state law claims.

B. Immunity Under Section 101.106 of the Texas Civil Practice and Remedies Code

The Officers also assert that they are entitled to immunity based on section 101.106 of the Texas Civil Practice and Remedies Code. That section provides that "[a] judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim." TEX. CIV. PRACTICE MANAGEMENT, & REM. CODE ANN. § 101.106 (Vernon 1997). The Texas Supreme Court has held that the immunity conveyed to a governmental unit's employees by section 101.106 is triggered by any judgment *in a Texas Tort Claim suit* against a governmental unit. Newman v. Oberstellar, 960 S.W.2d 621, 622-23 (Tex. 1997) (emphasis added). The cause of action against the employee need not arise under the Texas Tort Claims Act ("TTCA"). White v. Annis, 864 S.W.2d 127, 131 (Tex. App. 1993) ("If the Legislature had intended for a judgment in a Tort Claims Act case to bar only actions against the employee based on the same cause of action, it would have written the statute to so provide."). The "same subject matter" language in section 101.106 means "arising out of the same actions, transactions, or occurrences." Dallas County Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 339, 344 (Tex. 1998).

The Sorrells Family's state law claims against Dallas were not claims "under this chapter," i.e., the TTCA, because Dallas was only sued under § 1983. Bell v. Love, 923 S.W.2d 229, 231 (Tex. App. 1996) (recognizing that section 101.106 would only apply if the claims against the governmental unit were under the TTCA); see also Thomas v. Oldham, 895

S.W.2d 352, 355, 357 (Tex. 1995) (referring to "this chapter" as the TTCA). Because the judgment in favor of Dallas was based on § 1983, Texas's tort immunity does not apply.

III. Municipal Liability

"A municipality is liable under § 1983 for a deprivation of rights protected by the Constitution or federal laws that is inflicted pursuant to official policy." Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984). An official policy is defined as (1) "[a] policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority" or (2) "[a] persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." Id. With regard to the second type of official policy, "actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority," Id.

When the challenged conduct relates to informal policies or a custom of behavior, a single violation is not actionable. City of Okla. v. Tuttle, 471 U.S. 808, 821 (1985) ("To impose liability [because of a single incident] would be to impose [liability] simply because the municipality hired one 'bad apple.'"). A plaintiff must establish "a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread." Languirand v. Hayden, 717 F.2d 220, 227-28 (5th Cir. 1983).

The Sorrells Family argues that the district court improperly granted summary judgment in favor of Dallas. They

maintain that the policymaker for the City of Dallas is the Chief of Police. They assert that in this case, Chief of Police Bolton ("Bolton"), following an Internal Affairs investigation, exonerated all of the Officers, with the exception of Griffis. Therefore, they conclude that Bolton made a determination, as Dallas's policymaker, that the Officers acted within Dallas's formal written policies and procedures. They argue that either this proves that Dallas has a policy allowing for the use of excessive force or, alternatively, that this proves that Dallas's policymaker ratified the Officers' conduct. From this, they conclude that liability can be imposed on Dallas.

As the district court noted, however, this argument obscures the fact that the incident was single and isolated and that no policy causing Sorrell's injury has been shown. In fact, if anything, the Sorrells Family put forth evidence that Dallas has formal written policies designed to protect arrestees in these types of situations. Were we to hold Dallas liable in such a situation, we would be holding the city liable not for what its policy says, but for what Bolton interpreted that policy to require in a single-isolated incident. See Monell v. N.Y. City Dep't of Soc. Servs., 436 U.S. 658, 694 (1978) (holding that *respondeat superior* liability is unavailable in § 1983 suits). As such, the district court properly granted summary judgment in favor of Dallas on this claim.

CONCLUSION

For the reasons set forth above, we AFFIRM.

AFFIRMED

APPENDIX EXHIBIT "B"
JURISDICTIONAL STATUTES

28 U.S.C. § 1254(1)

§ 1254. Courts of appeals; certiorari; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

28 U.S.C. § 2101(c)

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

APPENDIX EXHIBIT "C"
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX "D"
DALLAS POLICE DEPARTMENT POLICIES

202.00 WRITTEN DIRECTIVES

A. All City of Dallas employees work under the regulations established by the City of Dallas Administrative Directives, Personnel Rules, and Civil Service Rules and Regulations. Written Directives of the Dallas Police Department are intended to supplement these regulations.

202.00 Special Orders (S.O. 95-24)

A. The Chief of Police will approve Special Orders to establish for a specific period of time:
   1. Department policy or procedures;
   2. Policy or procedures affecting two or more bureaus;
   3. Specific responsibilities and/or duties.

***315.00 USE OF RESTRAINING HOLDS**
(Moved to Section 903.00 – S.O. 97-05)

***315.01 Lateral Vascular Neck Restraint**
(Moved to Section 903.01 – S.O. 97-05)

***316.00 USE OF DEADLY FORCE**
(Moved to 906.00 – S.O. 97-05)

***316.01 Philosophy**
(Moved to 906.01 – S.O. 97-05)

***316.02 Use of Deadly Force Policy**
(Moved to 906.02 – S.O. 97-05)

*** 316.00 INVESTIGATIONS OF POLICE INVOLVED SHOOTINGS, SERIOUS INJURY, OR DEATH INCIDENTS**
(formerly 316.03) [S.O. 97-05]

When a Dallas Police Officer becomes involved in an incident in which either the officer or another person is seriously injured or killed, or where a death or serious injury occurs to a person in police custody, two different investigations will be conducted. [. . .] A criminal investigation will be conducted by the investigative unit having responsibility for the offense and an administrative investigation will be conducted by the Internal Affairs Division. Investigations will be conducted as outlined in the sections which follow.

***316.01 Criminal Investigation**
(formerly 316.04) [S.O. 97-05]

A. The Crimes Against Persons Division, Special Investigations Squad, will conduct a criminal investigation when, in the City of Dallas:
   1. Any Dallas Police Officer is seriously injured or killed in the performance of police-related duties;
   2. Any person is injured or killed as a result of a Dallas Police Officer discharging a firearm, acting in the performance of police-related duties, or within the scope of employment as a Dallas Police Officer while on or off duty;
   3. Any person is seriously injured or killed as a result of the use of any physical force used by a Dallas Police Officer, acting in performance of police-related duties or within the scope of employment as a Dallas Police Officer while on or off duty[.]

***316.03 Administrative Investigation**
(formerly 316.06) [S.O. 97-05]

A. The Internal Affairs Division will conduct an administrative investigation:

1. concurrently in any of the cases listed above under 361.01 A and F. [. . .]

[. . .]

D. The Internal Affairs Division will determine if the use of force was justified by the policy of this Department. The findings of the investigation will be summarized in a Special Report to the Chief of Police.

903.00 USE OF RESTRAINING HOLDS
(formerly 315.00) [S.O. 97-05]

903.01 Lateral Vascular Neck Restraint

*A. The Lateral Vascular Neck Restraint (LVNR) is the safest and most effective neck restraint method that can be used to control a resisting suspect. Except in cases of extreme emergencies where the use of deadly force would be justified, the LVNR is the only neck restraint method that can be used. The LVNR will be used only when appropriate, and in a manner consistent with the Response Continuum, when lesser levels of control are ineffective.

B. Policy: While control of a suspect through advice, warning, or persuasion is preferable, the use of physical force to control a subject is sometimes necessary. In some instances, the LVNR is the most appropriate level of control to be used. Officers may use the LVNR subject to the following provisions.

1. Use of an LVNR hold is justified:
   a. To control a physically resisting person;
   b. To defend an officer or other person;

c. To protect a person from self injury;
d. When lesser levels of control are ineffective or inappropriate for the resistance;
e. On physically resisting handcuffed prisoners when lower forms of control are ineffective.

2. The LVNR will not be used on subjects who are using techniques of non-cooperation and not posing a physical threat to anyone.

[. . .]

4. Under most circumstances, the LVNR will not be used on handcuffed subjects. There may be subjects, however, who after being handcuffed, still resist so violently that they pose a threat to the officer or others. In such cases, the LVNR may be utilized only if all other means of restraint have failed.
5. If a subject has been sprayed with Oleoresin Capsicum, the LVNR should only be applied under exigent circumstances.

C. Tactical Considerations.
1. The three levels of LVNR that may be employed are:
a. Level 1: Rear head lock
b. Level 2: Compression until conscious compliance
c. Level 3: Compression until unconsciousness
2. When resistance has stopped, the officer will immediately release the LVNR, taking care not to allow the individual to fall.
3. Under no circumstances will the LVNR be applied after resistance ceases.
4. The person will be handcuffed immediately and as soon as it is reasonably safe to do so, follow-up care will be given.

D. Follow-up Care

1. After using the LVNR on a subject, the officer will:

   a. Check the person's vital signs (pulse and breathing) to determine any apparent medical difficulties. [Do not place the subject in a prone position – this could result in positional asphyxia.] Provide CPR when necessary.

   b. Place the subject in a sitting position or roll the subject onto his or her side. Request an MICU to the scene.

   c. Provide constant monitoring of the subject until after transport to the Lew Sterrett Criminal Justice Center or Parkland Hospital.

[. . .]

F. Certain precautions must be taken with regard to handling and transporting of prisoners who are suspected of suffering drug-induced psychosis/ "excited delirium," especially if an LVNR has been applied (refer to Section 905.00).

905.00 HANDLING SUSPECTS EXHIBITING SYMPTOMS OF DRUG-INDUCED PSYCHOSIS/"EXCITED DELIRIUM"

(Formerly 314.15) [S.O. 97-05]

A. Individuals who are suffering from Drug-Induced Psychosis/"Excited Delirium" often exhibit these types of behavior:

1. Hallucinations
2. Sensitivity to light
3. Paranoia
4. Delusions of persecution
5. Unusually great strength

6. Aggression toward objects
7. Extremely high body temperatures (Hyperthermia)
8. Dilated pupils
9. Undressing in public
10. Hiding behind bushes, trees, or cars
11. High blood pressure
12. High pulse rate
13. Seizures
14. Thrashing after restraint
15. Jumping into water
16. Self-inflicted injury

B. Subjects suffering from this disorder may collapse and die without warning, and are subject to medical distress within an hour after being restrained. Subjects will be placed in an upright position (if possible) or on their side as soon as they are brought under control.

C. If a LVNR has been applied to control a violently resisting subject believed to be suffering from drug-induced psychosis/"excited delirium," officers will follow these procedures:

1. Immediately handcuff and roll the subject onto his/her side or place the subject in a sitting position. The subject will not be left placed in a prone position as this may result in positional asphyxia.
2. Monitor the subject's breathing and establish an airway, if necessary.
3. Check pulse at the wrist or carotid artery.
4. Check skin color.
5. Check to see if the subject is functionally conscious (*i.e.*, voluntary movement, awareness of surroundings, conversant).
6. Immediately request a Dallas Fire Department (DFD) MICU be called to the scene to evaluate and transport the prisoner to a medical facility.

7. Officers will render first aid, if necessary, until DFD personnel arrive at the scene (refer to 901.01D).

906.00 USE OF DEADLY FORCE

906.01 Philosophy

A. This philosophy is intended as a broad guide to the use of deadly force and as a moral and ethical approach to the use of deadly force policy. Although not intended as a strictly enforced set of rules, the philosophy statement describes the manner in which the procedures will be applied.

B. Protection of human life is a primary goal of the Police Department; therefore, Police Officers have a responsibility to use only the degree of force necessary to protect and preserve life.

C. Deadly force will be used with great restraint and as a last resort only when the level of resistance warrants the use of deadly force. The Dallas Police Department places a greater value on human life than on the protection of property; therefore the use of deadly force is not allowed to protect property interests.

906.02 Use of Deadly Force Policy

A. Justification for the Use of Deadly Force – In all situations, justification for the use of deadly force must be limited to the facts reasonably apparent to the officer at the time the officer decides to use the force.

B. Avoiding the Use of Deadly Force –

1. At the point when an officer should reasonably perceive that the potential exists that deadly force may be an outcome of any situation, the officer must plan ahead and use reasonable alternatives if time and opportunities permit. In each case, a "reasonable alternative" is defined as an action which may be taken by the officer that may allow the officer to avoid the use of deadly force. The reasonableness of the action is based upon the time available, the opportunity of performing the action, and the facts apparent to the officer prior to and during the incident.

[. . .]

C. Authorization to Use Deadly Force – Officers will only use deadly force to protect themselves or another person from imminent death or serious bodily injury.

[. . .]

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APPENDIX EXHIBIT "E"
INTERNAL AFFAIRS REPORT (10/19/99)

October 19, 1999

Terrell Bolton
Chief of Police

SUBJECT: Internal Investigation
Control Number 98-333

Sir:

SUMMARY

On September 17, 1998, Senior Corporal Joseph Cutrona, #4834, and Officer William Readdy, #5914, responded to a call at 3910 N. Haskell Street regarding Mr. Shane Sorrells, who was exposing himself and masturbating in his vehicle. Sergeant Stanley Griffis, #3172, also responded to the location. Mr. Sorrells resisted attempts to arrest by Senior Corporal Cutrona, Officer Readdy, and Sergeant Griffis and a struggle ensued. Senior Corporal Thomas Moore, #3611, Officer Richard Hunt, #6175, and Officer Arnaldo Rivera, #7228, responded to the location and assisted in arresting Mr. Sorrells, who continued to resist the officers. Mr. Sorrells died at the scene, shortly after having been handcuffed. As a result, this investigation was initiated.

ALLEGATIONS DEVELOPED

1. It is alleged that on September 17, 1998, Senior Corporal Joseph Cutrona, #4834, used unnecessary or inappropriate force.

2. It is alleged that on September 17, 1998, Sergeant Stanley W. Griffis, #3172, failed to appropriately engage in, and properly control a police incident under his supervision.

FINDINGS

CLASSIFICATION OF ALLEGATIONS

Allegation #1 – Unnecessary or inappropriate force – **SUSTAINED**

Allegation #2 – Failed to appropriately engage in and properly control a police incident – **UNFOUNDED**

CONCLUSIONS

The allegation that, on September 17, 1998, Senior Corporal Joseph Cutrona, #4834, used unnecessary or inappropriate force against Mr. Shane Sorrells is classified as "**SUSTAINED**," based on the testimonial evidence gathered in the course of this investigation. Senior Corporal Moore testified that immediately after Mr. Sorrells was handcuffed, and officers were releasing their holds (except for Senior Corporal Moore and Officer Readdy), Senior Corporal Cutrona pushed down, forcefully, on Mr. Sorrells' back with his foot, as if to make sure that Mr. Sorrells stayed down. Senior Corporal Cutrona did not leave his foot on Mr. Sorrells' back for longer than a second or two. Senior Corporal Moore testified that he believed Mr. Sorrells was under sufficient control, so as not to be a danger to anyone, and does not know the reason for Senior Corporal Cutrona's action.

Senior Corporal Cutrona testified that he observed Mr. Sorrells trying to push himself up off the ground while Officer Readdy, Officer Hunt, and Senior Corporal Moore were attempting to handcuff Mr. Sorrells. Senior Corporal

Cutrona jumped on Mr. Sorrells' back, placing his right foot on Mr. Sorrells' right shoulder area and his left foot on Mr. Sorrells' mid-back, while ordering him to stay on the ground. Senior Corporal Cutrona got off of Mr. Sorrells' back, after being handcuffed, and went directly to the ambulance for first aid. Senior Corporal Cutrona stated that he was not taught this maneuver (standing on a person's back) during Departmental training and that his only intention was to keep Mr. Sorrells on the ground so that he could be handcuffed. Senior Corporal Cutrona testified that it is possible that his feet remained on "Mr. Sorrells' back for several moments after he was handcuffed because he could not see clearly and it was not immediately stated by the other officers that the handcuffs were in place. Senior Corporal Cutrona also stated that it is possible that an untrained observer might have misinterpreted his jumping on Mr. Sorrells' back as a kick.

Officer Readdy testified that Officer Hunt placed a handcuff on Mr. Sorrells' left arm. Officer Readdy then secured Mr. Sorrells' right wrist and handcuffed it after Mr. Sorrells was placed on his stomach. Officer Readdy believes that Senior Corporal Moore held Mr. Sorrells' legs down, as he held Mr. Sorrells' right elbow, and Officer Hunt held Mr. Sorrells' left arm. Officer Readdy believes that Senior Corporal Cutrona was standing by Mr. Sorrells' head. Officer Readdy testified that he did not observe Senior Corporal Cutrona stand on Mr. Sorrells or push him down with his foot. Officer Readdy did not see any officer kick Mr. Sorrells.

Sergeant Griffis testified that he did not see the application of the second handcuff, nor did he see Mr. Sorrells on his stomach. Sergeant Griffis did not see Senior Corporal Cutrona stand or jump on Mr. Sorrells' back, nor did he see any officer kick Mr. Sorrells.

Officer Hunt testified that as Mr. Sorrells was lying on his stomach, he and Officer Readdy were at Mr. Sorrells' sides, opposite each other. Officer Hunt believes that Senior Corporal Moore was at Mr. Sorrells' feet and Senior Corporal Cutrona was to Officer Hunt's left, but Officer Hunt does not recall what Senior Corporal Cutrona was doing. Officer Hunt testified that while he was involved in the handcuffing of Mr. Sorrells' wrists, he never witnessed Senior Corporal Cutrona standing or pushing on Mr. Sorrells' back. Officer Hunt did not witness any officer kick Mr. Sorrells.

Mr. Mincey testified that he observed two officers at Mr. Sorrells' head and chest area, two officers at Mr. Sorrells' feet, and one officer standing over Mr. Sorrells. Mr. Mincey stated that as the officers held Mr. Sorrells down to the ground, a Caucasian officer kicked Mr. Sorrells in the side. Mr. Mincey observed the handcuffs on Mr. Sorrells after the officers rolled Mr. Sorrells over. Mr. Mincey stated that none of the officers stood on top of Mr. Sorrells, only over him.

Mr. Carter testified that Mr. Sorrells was on the ground and that he observed an officer positioned at each of Mr. Sorrells' arms and legs, and one officer holding Mr. Sorrells in a neck restraint. During this struggle, Mr. Carter witnessed a single kick, by an officer, to Mr. Sorrells' back. Mr. Carter stated that this kick could best be described as a stomp, in an effort to hold Mr. Sorrells' down. Mr. Carter stated that this action took place prior to Mr. Sorrells being handcuffed.

Mr. Knight testified that he did not witness any officer kick Mr. Sorrells during the struggle.

As a result of his actions, Senior Corporal Cutrona should be held accountable for the following rule violations:

DALLAS POLICE DEPARTMENT

CODE OF CONDUCT

4.10 Officers shall not use any unnecessary or inappropriate force against any person.

Senior Corporal Cutrona violated this rule when he forcefully pushed down and stood on Mr. Sorrells' back.

Allegation #2, that Sergeant Stanley W. Griffis, #3172, failed to appropriately engage in, and properly control a police incident under his supervision, is classified as "**UNFOUNDED**," based on the testimonial evidence gathered through the course of this investigation.

Sergeant Griffis testified that after he broke the passenger window of Mr. Sorrells' vehicle, he sprayed O. C. Spray on Mr. Sorrells as he sat inside his vehicle. Sergeant Griffis walked towards the alley to get fresh air because he felt the effects of the O.C. Spray. Sergeant Griffis stated that he had trouble seeing and breathing and did not directly engage in the physical struggle with Mr. Sorrells, at that point, because there was no tactical advantage to do so. Sergeant Griffis stated that such action would have been counter productive. Sergeant Griffis stated that he did not use the ASP baton, which Senior Corporal Cutrona took from him and utilized it on Mr. Sorrells because there was no clear area to strike without injuring the officers in the process. Sergeant Griffis testified that he moved back from the struggle to allow Senior Corporal Moore and Officer Hunt access to assist with the struggle involving Mr. Sorrells. Sergeant Griffis testified that he and Senior Corporal Moore grabbed Mr. Sorrells' feet, but that this action did not help the other officers' struggle to control Mr. Sorrells' hands. Sergeant Griffis released his hold on Mr. Sorrells' feet because he observed the paramedics walking in the opposite direction of their location. Sergeant Griffis then went towards the alley to

get the paramedics' attention. Sergeant Griffis stated that when he turned back around, the struggle to handcuff Mr. Sorrells was essentially over. Sergeant Griffis testified that he did not hear Mr. Sorrells state that he could not breathe. Sergeant Griffis testified that he did not see Senior Corporal Cutrona kick Mr. Sorrells and that no one informed him that Mr. Sorrells had been kicked. Sergeant Griffis stated that he would have taken action if he had seen Mr. Sorrells being kicked or if he had been informed of such. Sergeant Griffis stated that at no time did Officer Readdy, Senior Corporal Cutrona, Senior Corporal Moore, Officer Hunt, or himself use more force than was necessary to arrest Mr. Sorrells.

Senior Corporal Cutrona testified that Sergeant Griffis was at the location with him and Officer Readdy at all times, supervising the situation as it unfolded. Senior Corporal Cutrona does not recall where Sergeant Griffis was standing or doing as the situation escalated, but presumed that Sergeant Griffis was close by. Because Sergeant Griffis is a supervisor, Senior Corporal Cutrona stated that he did not expect Sergeant Griffis to get physically involved, because he knew Officer Readdy was present and would be physically engaged with Mr. Sorrells. Senior Corporal Cutrona did not believe that Sergeant Griffis' physical assistance in restraining Mr. Sorrells was necessary, because Senior Corporal Cutrona felt that he and Officer Readdy could gain control of Mr. Sorrells.

Officer Readdy does not believe that Sergeant Griffis failed to engage in the struggle with Mr. Sorrells. Officer Readdy does not recall if Sergeant Griffis was physically involved with Mr. Sorrells, but Officer Readdy did not believe that it was necessary for Sergeant Griffis to become more involved. Officer Readdy believes that Sergeant Griffis adequately engaged in the incident by breaking the vehicle window, utilizing the O. C. Spray, calling for cover elements, and monitoring the situation throughout the incident.

Ms. Oakey stated that two officers (identified as Officer Readdy and Sergeant Griffis) stood to the side and watched as Senior Corporal Cutrona struck Mr. Sorrells with the ASP baton. Ms. Oakey stated that one officer (identified later as Sergeant Griffis) went to the car to use the police radio.

The preponderance of testimonial evidence indicates that Sergeant Griffis appropriately engaged in the incident involving Mr. Sorrells when he broke the vehicle window, utilized the O.C. Spray, and made physical attempts to restrain him. Sergeant Griffis properly controlled the incident by calling for additional assistance, requesting an ambulance, and monitoring the actions of the officers throughout the struggle with Mr. Sorrells. Contrary to Ms. Oakey's statement, it was determined through this investigation that Officer Readdy was physically engaged with Mr. Sorrells and Sergeant Griffis did stand to the side and watched. However, this investigation did determine that Sergeant Griffis used the police radio in a police vehicle, as Ms. Oakey stated. It has been alleged that Senior Corporal Cutrona's action occurred after Mr. Sorrells was handcuffed and while Sergeant Griffis was receiving medical attention for the effects of the O.C. Spray. Sergeant Griffis testified that he did not hear Mr. Sorrells state that he could not breathe, he did not see Senior Corporal Cutrona kick Mr. Sorrells, and no one informed Sergeant Griffis that Mr. Sorrells had been kicked. Sergeant Griffis testified that he would have taken action if he had been aware of Mr. Sorrells being kicked. Therefore, this allegation is classified as "**UNFOUNDED**."

O. C. Spray was utilized during this incident, prior to Mr. Sorrells physically resisting the officers. Senior Corporal Cutrona and Officer Readdy testified that they verbally told Mr. Sorrells, who was nude and masturbating, to exit the vehicle. Senior Corporal Cutrona and Officer Readdy testified that they pounded on the windows of Mr. Sorrells' vehicle, which was locked, as they told him to exit the

vehicle. These attempts were unsuccessful and Officer Readdy and Senior Corporal Cutrona requested a supervisor to the scene. While awaiting a supervisor, Senior Corporal Cutrona testified that he sprayed O.C. Spray through the air conditioning vents of Mr. Sorrells' vehicle, hoping that it would cause Mr. Sorrells to exit his vehicle. Officer Readdy testified that he and Senior Corporal Cutrona then attempted to pry the sunroof open of Mr. Sorrells' vehicle, in order to spray O. C. Spray inside, but again were not successful. These attempts were ineffective and resulted in Sergeant Griffis breaking the vehicle's window. The following witnesses confirmed the officers' actions: Ms. Cruz, Mr. Moya, and Mr. Hernandez. Senior Corporal Cutrona, Officer Readdy and Sergeant Griffis resorted to O. C. Spray after their prior attempts to get Mr. Sorrells to exit his vehicle failed.

It has been alleged that Senior Corporal Cutrona struck Mr. Sorrells' back repeatedly with a baton and kicked him. Ms. Oakey testified that Mr. Sorrells was sitting on the concrete in the parking lot, masturbating, as Senior Corporal Cutrona struck him repeatedly in the back with the baton. Ms. Oakey stated that Senior Corporal Cutrona kicked Mr. Sorrells several times in the back when Mr. Sorrells pulled his arm away from Senior Corporal Cutrona. Ms. Oakey stated that Officer Readdy and Sergeant Griffis stood to the side and watched as Senior Corporal Cutrona struck Mr. Sorrells.

Senior Corporal Cutrona testified that he and Officer Hunt removed Mr. Sorrells from his vehicle, after Mr. Sorrells refused to exit the vehicle voluntarily. Mr. Sorrells was masturbating while inside his vehicle and continued to do so even after being extracted from it. After refusing verbal commands to place his hands behind his back, Mr. Sorrells resisted Officer Readdy's attempt to handcuff him by pulling away from Officer Readdy and locking his arm out. Senior Corporal Cutrona attempted to secure Mr. Sorrells' arm with

the ASP baton, utilizing a Departmentally taught maneuver, but was not successful. Senior Corporal Cutrona then struck Mr. Sorrells several times on the radial nerve of his right arm, while ordering him to place his hands behind his back. Senior Corporal Cutrona stated that the ASP baton was fully extended, and it is possible that he struck Mr. Sorrells' back during his efforts to strike Mr. Sorrells' right arm.

Officer Readdy testified that Mr. Sorrells was on the parking lot, struggling and jerking around, after he and Senior Corporal Cutrona removed Mr. Sorrells from his vehicle. Mr. Sorrells was continually thrashing and moving his body position, refusing to place his hands behind his back. Officer Readdy attempted to grab Mr. Sorrells and Senior Corporal Cutrona attempted a wrist-lock with the ASP baton, but was not successful. Officer Readdy stated that Senior Corporal Cutrona delivered strikes to Mr. Sorrells' left radial nerve. Officer Readdy did not witness Senior Corporal Cutrona strike Mr. Sorrells on the back, but Mr. Sorrells was in a continuous state of motion.

Sergeant Griffis testified that he is not aware as to how the vehicle door was opened, but he observed Mr. Sorrells lying on his left side on the pavement as he masturbated. Officer Readdy and Senior Corporal Cutrona were attempting to handcuff Mr. Sorrells, but Mr. Sorrells kept squirming. During this struggle, Senior Corporal Cutrona took the ASP baton from Sergeant Griffis and delivered several baton strikes to Mr. Sorrells' arms and legs. Mr. Sorrells continued to kick, twist, and squirm, causing him to pivot in a circular fashion. Sergeant Griffis did not see Senior Corporal Cutrona or Officer Readdy beat or kick Mr. Sorrells in the back.

Mr. Moya testified that the officers pulled Mr. Sorrells out of the vehicle and onto the ground, after Mr. Sorrells refused to exit the vehicle. Mr. Sorrells was lying on his left side on the ground and continued to masturbate. The officers attempted to grab Mr. Sorrells but he continued to masturbate. At that

time, the officers struck Mr. Sorrells all over his body with an extended baton, their hands, and kicked him. Mr. Sorrells continued to masturbate and did not ward off any of the strikes. Mr. Moya believes that the officers struck Mr. Sorrells because he continued to masturbate and refused to obey them.

Mr. Giron stated that the officers pulled Mr. Sorrells, who was naked, out of the vehicle by the hand. Mr. Sorrells was standing as he struck the officers with his hands in an attempt to escape. Mr. Sorrells then struck an officer in the face and the officers were attempting to grab him. Mr. Giron returned to his apartment. When Mr. Giron went out again, he observed Mr. Sorrells run towards some nearby apartments. The officers ran after Mr. Sorrells, knocked him down to the ground, and handcuffed him. Mr. Giron did not witness a struggle on the ground between Mr. Sorrells and the officers when Mr. Sorrells was taken out of the vehicle.

Photographs of Mr. Sorrells' back, and the autopsy report, reveal that there is an oblique 13 x 1/4 inch rod-shaped patterned, abraded contusion near the midportion of Mr. Sorrells' back.

Based on the testimonial and documentary evidence collected during the course of this investigation, the allegation that Senior Corporal Cutrona repeatedly struck Mr. Sorrells' back with the baton and that the officers kicked Mr. Sorrells is classified as, "**INCONCLUSIVE**." The preponderance of the evidence indicates that Senior Corporal Cutrona did strike Mr. Sorrells on the back with the ASP baton, but the evidence can not prove or disprove that the single strike indicated in the autopsy report was intentional. Ms. Oakey identified Senior Corporal Cutrona as the officer who kicked Mr. Sorrells, after he was removed from his vehicle. Mr. Moya testified that the police kicked Mr. Sorrells, but did not identify which officer. Mr. Giron, who witnessed this portion of this incident, testified that he

never saw a struggle between the officers and Mr. Sorrells, on the ground. Senior Corporal Cutrona, Officer Readdy, and Sergeant Griffis have testified that they did not kick Mr. Sorrells, nor did they observe any officer kick Mr. Sorrells. The preponderance of evidence can not prove or disprove that Mr. Sorrells was kicked, nor by whom, at this point of this incident.

Officer Ready applied a Lateral Vascular Neck Restraint (L.V.N.R.) on Mr. Sorrells. Mr. Sorrells suffered laryngeal fractures (thyroid and cricoid cartilages) during this incident. Mr. Sorrells stopped breathing as he was still laying face down, after being handcuffed, and not placed in a sitting position. Mr. Sorrells ran to another apartment complex parking lot and Officer Readdy pursued him. Officer Readdy was then able to circle behind Mr. Sorrells' right and attempted a L.V.N.R. on Mr. Sorrells. Officer Readdy grabbed Mr. Sorrells, who was approximately two or three inches taller, from behind the shoulders. While holding on to his shoulders, Officer Readdy kicked the back of Mr. Sorrells' left knee with his left foot. Mr. Sorrells buckled slightly and Officer Readdy was then able to place his left arm around Mr. Sorrells' neck and initiate a Level 1 L.V.N.R. Mr. Sorrells was continually thrashing and jerking about and continued to ignore the officers' verbal commands to place his hands behind his back. Officer Readdy attempted to go to a Level 2 L.V.N.R., but could not obtain firm leverage due to the fact that Mr. Sorrells continued to struggle and was so slippery. Officer Readdy did not believe that the L.V.N.R. was having any real effect, but basically kept Mr. Sorrells from running away. Mr. Sorrells went to the ground, landing on his buttocks, at which time Officer Readdy released the L.V.N.R. hold. Officer Readdy was not able to fully initiate a Level 2 L.V.N.R. because Mr. Sorrells slipped out of the hold, due to his struggling and sweating. Officer Readdy testified that Mr. Sorrells struggled and resisted the entire time that the L.V.N.R. was employed, and Officer Readdy does not recall any point where he felt that

Mr. Sorrells was injured by the maneuver. Mr. Sorrells did not lose consciousness and was still cursing and talking as he was being handcuffed on the ground. Mr. Sorrells did not complain of injury or manifest distress in Officer Readdy's presence. Officer Readdy never heard Mr. Sorrells say, "I can't breathe." Officer Readdy had released the L.V.N.R. hold to the time that Mr. Sorrells stopped breathing. After Mr. Sorrells was handcuffed, Officer Readdy went to the ambulance and obtained medical attention.

Senior Corporal Cutrona testified that Officer Readdy got behind Mr. Sorrells and placed an L.V.N.R. hold on him, in an attempt to subdue him. The maneuver did not appear to have affected Mr. Sorrells, who continued flailing his arms. Senior Corporal Cutrona struck Mr. Sorrells' right common peroneal nerve with the ASP baton, while ordering him to the ground. As Mr. Sorrells continued to struggle, Senior Corporal Cutrona noticed Mr. Sorrells' eyes start to close and face slightly discolor. Senior Corporal Cutrona had seen these symptoms in other L.V.N.R. incidents and felt that the L.V.N.R. was working. Mr. Sorrells went to the ground on his buttocks, in a somewhat subdued but still conscious state, at which time Officer Readdy released the L.V.N.R. hold. Mr. Sorrells was handcuffed, and Senior Corporal Cutrona went to obtain medical attention. Senior Corporal Cutrona never heard Mr. Sorrells say that he could not breathe.

Sergeant Griffis testified that Officer Readdy applied an L.V.N.R. hold on Mr. Sorrells, in an effort to gain control of him. Mr. Sorrells continued to squirm and twist to get loose. Sergeant Griffis never saw Mr. Sorrells lose consciousness, but the L.V.N.R. was only applied for a few seconds. Officer Readdy released the L.V.N.R. hold when Mr. Sorrells went to the ground. Mr. Sorrells was placed on the ground on his side, while each officer attempted to get Mr. Sorrells under control. Sergeant Griffis did not assist with the application of the second handcuff nor did he hear Mr. Sorrells say that he could not breathe.

Senior Corporal Moore testified that when he reached the back parking lot of the apartment complex, he observed Officer Readdy holding Mr. Sorrells in an L.V.N.R. Senior Corporal Cutrona was standing at Mr. Sorrells' feet, holding an ASP baton. Upon Senior Corporal Moore's arrival, Officer Readdy still had Mr. Sorrells, who was in a sitting position, by the neck and Officer Hunt grabbed Mr. Sorrells' left arm. Senior Corporal Moore and Sergeant Griffis grabbed Mr. Sorrells' feet. Senior Corporal Moore stated that Officer Readdy released the L.V.N.R. hold as Mr. Sorrells was rolled to his left side. Senior Corporal Moore testified that Mr. Sorrells did not lose consciousness as a result of the L.V.N.R., but the L.V.N.R. did assist in restraining Mr. Sorrells' resistance. Mr. Sorrells was handcuffed and Mr. Sorrells continued to curse and flop around and kick his legs, in an attempt to get up. Senior Corporal Moore placed his right foot on Mr. Sorrells' right calf, as he stood on Mr. Sorrells' right side. Officer Readdy was to Mr. Sorrells' right side with an arm lock type hold on Mr. Sorrells' arms. As Mr. Sorrells was lying face down, Senior Corporal Moore heard him say, "I can't breathe," but Mr. Sorrells then continued to curse. One of the paramedics approached Mr. Sorrells, knelt down and looked into Mr. Sorrells' face, but then returned to the ambulance in an unconcerned manner. About a minute and a half later, Mr. Sorrells went quiet and Senior Corporal Moore observed that Mr. Sorrells was not breathing. Senior Corporal Moore testified that Mr. Sorrells' actions had not indicated that he was having difficulty breathing, and that waiting for the leg restraints, before placing Mr. Sorrells in an upright position, was a more prudent course of action.

Officer Hunt testified that when he arrived at the location, he observed Officer Readdy attempting to apply an L.V.N.R. on Mr. Sorrells, who was in a sitting position with his right shoulder against a vehicle. Officer Readdy was to the back left of Mr. Sorrells with his left arm around Mr. Sorrells' upper chest and neck. Officer Readdy appeared winded and

simply hanging on, rather than forcibly applying the L.V.N.R. Mr. Sorrells was conscious, masturbating, and cursing. Officer Hunt believes that he grabbed Mr. Sorrells' left arm as Senior Corporal Moore and Sergeant Griffis grabbed Mr. Sorrells' feet. Mr. Sorrells was placed on his stomach and Officer Hunt and Officer Readdy completed handcuffing Mr. Sorrells as they knelt on opposite sides of Mr. Sorrells. Senior Corporal Cutrona informed Officer Hunt of what had occurred and then Senior Corporal Cutrona went to obtain medical attention. Officer Hunt relieved Officer Readdy of his hold on Mr. Sorrells and told him to obtain medical attention. Officer Rivera arrived and Officer Hunt asked him to obtain leg restraints for Mr. Sorrells from Officer Readdy's police vehicle. As Officer Rivera returned with the leg restraints, Mr. Sorrells, who had just finished cursing at Officer Hunt, suddenly got quiet. Officer Hunt noticed that Mr. Sorrells' face was blue and that Mr. Sorrells was not breathing. Officer Hunt then yelled for assistance from the paramedics for Mr. Sorrells. Officer Hunt testified that approximately two or three minutes had elapsed from the time that Mr. Sorrells was handcuffed to the time that he noticed that Mr. Sorrells was not breathing. Officer Hunt stated that Mr. Sorrells was left on his stomach, as a precaution against further resistance, and until the leg restraints could have been applied. Officer Hunt never heard nor did Mr. Sorrells indicate to him that he was having difficulty breathing. If Mr. Sorrells had indicated either verbally or through labored breathing, that he was having difficulty, Officer Hunt would have attempted to help Mr. Sorrells by rolling him up to a seated position.

Officer Rivera testified that when arrived to the location, he observed Officers Hunt and Readdy holding Mr. Sorrells down by his shoulder blades as he moved his arms and shoulders back and forth, while in handcuffs. Officer Hunt asked Officer Rivera for leg restraints because Mr. Sorrells was still moving his legs up and down. Officer Rivera returned with the leg restraints and began to apply one when

Officer Hunt yelled, "Turn him over, he's stopped breathing." Officer Hunt turned Mr. Sorrells over and asked that the paramedics hurry because Mr. Sorrells had stopped breathing.

Mr. Carter, a Dallas Fire Department paramedic, testified that he observed four or five police officers struggling with Mr. Sorrells. Mr. Sorrells was on the ground, violently resisting the officers' efforts to place him face down on the ground, with his hands behind his back. An officer was positioned on each of Mr. Sorrells' arms and legs, and an officer was holding Mr. Sorrells in a neck restraint. Mr. Carter stated that the officer was behind Mr. Sorrells, with his arms around Mr. Sorrells' neck. Mr. Sorrells' chin was over the officer's arm, in the area of the elbow. Mr. Carter observed one kick to Mr. Sorrells' back and one or two baton strikes to Mr. Sorrells' arm. Mr. Carter testified that Mr. Sorrells stated once or twice that he could not breathe and attributed this to the on-going struggle. Mr. Sorrells was handcuffed and the officers released their holds. After Mr. Sorrells was subdued, the officers asked if they could clean themselves up at the ambulance. Mr. Carter went back to the ambulance and drove it around the back and down the alley. This took approximately three to four minutes. Within 30 seconds of Mr. Carter's arrival from having retrieved the ambulance, an officer said that Mr. Sorrells was not breathing. Mr. Knight and Mr. Carter administered medical attention to Mr. Sorrells. Mr. Carter testified that as he attempted to intubate Mr. Sorrells, he did not notice any damage to Mr. Sorrells' airway. Mr. Carter had no trouble intubating Mr. Sorrells and ensuring a good airway for Cardio Pulmonary Resuscitation.

Mr. Knight, a Dallas Fire Department paramedic, testified that he observed four or five officers wrestling with Mr. Sorrells. The officers wrestled with Mr. Sorrells while he was standing, until the officers took Mr. Sorrells to the ground. The officers were attempting to handcuff

Mr. Sorrells. While the officers were trying to handcuff Mr. Sorrells, one officer was holding Mr. Sorrells' head, to keep him from spitting, and two officers placed their knees on Mr. Sorrells' back to hold him still. At that point, Mr. Sorrells did say that he could not breathe. Once Mr. Sorrells was handcuffed, the officers got off of him and Mr. Knight walked over to Mr. Sorrells and asked him if he could breathe and if he was all right. Mr. Sorrells cursed at Mr. Knight and continued to curse at the officers. Mr. Sorrells did not appear to be in any respiratory distress. Mr. Knight helped the officers clean their scrapes and Mr. Sorrells' spit while his partner, Mr. Carter, went to drive the ambulance from the front of the apartment complex to the back. Mr. Sorrells continued to curse at everyone. While Mr. Knight and Mr. Carter were unloading the stretcher, an officer standing beside Mr. Sorrells stated, "I think he stopped breathing." Mr. Knight and Mr. Carter then administered medical attention to Mr. Sorrells.

Mr. Mincey testified that the officers were attempting to get Mr. Sorrells to the ground. Mr. Sorrells and the officers all fell to the ground together. Mr. Mincey stated that at least four officers held Mr. Sorrells to the ground, as he laid on his back, and then a Caucasian officer kicked Mr. Sorrells in the side.

The preponderance of evidence indicates that Officer Readdy was justified in utilizing the L.V.N.R. hold and that he attempted to employ it appropriately. Officer Readdy testified that he attempted to employ a Level 2 L.V.N.R., which includes compression to Mr. Sorrells' neck, but was not able to do so due to Mr. Sorrells' resistance. Mr. Sorrells did not lose consciousness nor did he stop breathing at the time the L.V.N.R. was applied. According to Dr. Guileyardo's opinion, stated in the autopsy report, the laryngeal fractures contributed to Mr. Sorrells' death, but did not cause it.

The testimonial evidence indicates that Mr. Sorrells resisted all attempts to restrain him. Even though Mr. Sorrells was handcuffed and in a prone position on the floor, he still attempted to get up. Senior Corporal Readdy and Officer Hunt were waiting for the leg restraints to be applied before placing Mr. Sorrells in a sitting position. Mr. Sorrells suffered medical distress before reaching that point.

The preponderance of the evidence collected during the course of this investigation indicates that Mr. Sorrells was observed committing a sexual crime, in the public's view. The involved officers had probable cause to arrest Mr. Sorrells, and he resisted arrest. The involved officers responded to Mr. Sorrells' resistance by escalating their force. The use of force was in accordance with the Response Continuum, with the exception of the sustained allegation presented to Senior Corporal Cutrona. According to the autopsy report, Mr. Sorrells died as a result of cocaine abuse and a health condition. Mr. Sorrells' resistance and the officers' use of force to restrain Mr. Sorrells were also associated with his death.

CHAIN OF COMMAND RECOMMENDATIONS

Sergeant Griffis utilized a full can of O.C. Spray as Mr. Sorrells sat in his vehicle. Even though Sergeant Griffis saw that the O. C. Spray was not affecting Mr. Sorrells, Sergeant Griffis continued to spray it. Sergeant Griffis' use of O. C. Spray caused a cross-contamination, which affected only him, Senior Corporal Cutrona and Officer Readdy. It is recommended that Sergeant Griffis' Chain of Command review his conduct and take the appropriate action.

Senior Corporal Cutrona is certified to carry a PR-24 Baton. Senior Corporal Cutrona did not have his baton with him at the time of this incident and had to utilize Officer Readdy's ASP Baton as this event unfolded. It is recommended that

Senior Corporal Cutrona's Chain of Command review his conduct and take appropriate action.

This investigation is complete and it is recommended that the Internal Affairs Division take no further action.

[Signature]
Dora Alice Saucedo-Falls
Deputy Chief of Police
Internal Affairs Division

[Signature]
TERRELL BOLTON
CHIEF OF POLICE

———— ♦ ————

APPENDIX EXHIBIT "F"
INTERNAL AFFAIRS RECOMMENDATIONS
(12/08/99)

Memorandum [Symbol]
CITY OF DALLAS

DATE: December 8, 1999
TO: Terrell Bolton
Chief of Police
SUBJECT: Disciplinary Decision 98-333
City Attorney Review: Y

EMPLOYEE(S)	NO.	DATE OF APPOINTMENT	DATE OF CURRENT ASSIGNMENT	DIV'N
Joseph Cutrona	4834	03/83	07/92	Central Detention Services
Stanley Griffis	3172	09/71	10/98	

SYNOPSIS:

There are two allegations, one allegation is against Senior Corporal Joseph A. Cutrona, #4834 and one allegation is against Sergeant Stanley W. Griffis, #3172.

1. It is alleged that on September 17, 1998, Senior Corporal Joseph A. Cutrona, #4834, used unnecessary or inappropriate force.

2. It is alleged that on September 17, 1998, Sergeant Stanley W. Griffis, #3172, failed to appropriately engage in and control a police incident under his supervision.

FINDINGS:

Allegation #1 is **Sustained** and Allegation #2 is **Unfounded**.

RULE VIOLATIONS, CATEGORIES:

DALLAS POLICE DEPARTMENT–CODE OF CONDUCT
CHAPTER IV
PROFESSIONAL CONDUCT AND PERSONAL BEARING

4.10 Officers shall not use any unnecessary or inappropriate force against any person.

PRIOR DISCIPLINE:

01-03-85 – Misuse Of Overtime – **Documented Counseling**
04-26-87 – Damage To Property Or Equipment – **Supervisor's Report**
10-11-90 – Dereliction Of Duty – **Supervisor's Report**
09-16-91 – Excessive Force Arrest – **Supervisor's Report**
07-03-97 – Sleeping Or Loafing On Duty – **Written Reprimand**
03-10-98 – Missed Or Late To Court Assignment – **Documented Counseling**
05-14-98 – Conduct Discrediting Department – **Supervisor's Report**
08-25-98 – Missed or Late to Court Assignment – **Documented Counseling**

RECOMMENDATIONS:

Sergeant through Assistant Chief – **Written Reprimand**

[Signature]
J. C. Martinez, Deputy Chief of Police
Internal Affairs Division

APPENDIX EXHIBIT "G"
POLICE CHIEF BOLTON
CORRESPONDENCE TO CUTRONA
(01/13/00)
[symbol]
CITY OF DALLAS

January 13, 2000

Mr. Joseph Cutrona
[address redacted]

Dear Mr. Cutrona:

Pursuant to the authority vested in me as Chief of Police, by the Charter of the City of Dallas, I have suspended you without pay as an employee of the Dallas Police Department for a period one (10-hr.) working day, effective Saturday, January 15, 2000. You will report to your regularly assigned schedule, on Sunday, January 16, 2000.

I have taken this action because you violated Chapter IV, Section 4I have taken this action because you violated Chapter IV, Section 4.10 of the Dallas Police Department Code of Conduct, which reads as follows:

DALLAS POLICE DEPARTMENT–CODE OF CONDUCT
CHAPTER IV
PROFESSIONAL CONDUCT AND PERSONAL BEARING

4.10 Officers shall not use any unnecessary or inappropriate force against any person.

You violated Chapter 4, Section 4.10 of the Dallas Police Department Code of Conduct when, on September 17, 1998, you forcefully pushed down and stood on Mr. Sorrells' back.

In addition, your disciplinary history indicates:

01-03-85	Misuse Of Overtime - Documented Counseling -
04-26-87	Damage To Property Or Equipment - Supervisor's Report
10-11-90	Dereliction Of Duty - Supervisor's Report
09-16-91	Excessive Force Arrest - Supervisor's Report
07-03-97	Sleeping Or Loafing On Duty - Written Reprimand
03-10-98	Missed Or Late To Court Assignment - Documented Counseling
05-14-98	Conduct Discrediting Department - Supervisor's Report
08-25-98	Missed or Late to Court Assignment - Documented Counseling

Any future violation by you of the Police Code of Conduct, City Personnel Rules, or departmental rules or regulations issued by the Chief of Police will result in the appropriate penalty for such violation and may result in more severe disciplinary action, as provided in Section 2.2 of the Police Code of Conduct. The Code of Conduct provides that failure to comply with any rule or regulation of the Department subjects the offender to disciplinary action, including dismissal from service.

If you desire to appeal this suspension, you must, within five (5) days from the receipt of this letter, demand a hearing before City Manager Teodoro J. Benavides, 1500 Marilla, Room 4-E-N. Such demand must be made in writing, otherwise the suspension will become final and non-appealable.

Sincerely,
[signature]
TERRELL BOLTON
CHIEF OF POLICE

APPENDIX EXHIBIT "H"
POLICE CHIEF BOLTON
MEMORANDUM TO DALLAS CITY MANAGER
(01/13/00)

[symbol]
CITY OF DALLAS

DATE	January 13, 2000
TO	Teodoro J. Benavides, City Manager
SUBJECT	Suspension Without Pay Senior Corporal Joseph Cutrona, #4834 12-01; Employee # 16576

I have given Senior Corporal Cutrona a suspension without pay for a period of One (1) 10-Hour Day, effective Saturday, January 15, 2000. Senior Corporal Cutrona will report to his regularly assigned schedule on Sunday, January 16, 2000.

I have taken this action because Senior Corporal Cutrona violated Chapter Dallas Police Department Code of Conduct Chapter IV, Section 4.10.

A copy of the letter written to Senior Corporal Cutrona is attached.

[signature]
Terrell Bolton
Chief of Police

———— ♦ ————

Supreme Court, U.S.
FILED

No. 02-___ 02 641 OCT 8 - 2002

OFFICE OF THE CLERK

In the
Supreme Court of the United States
October Term, 2002

ESTATE of SHANE G. SORRELLS, By and Through Its Independent Executrix, Sheryl Thostenson, Dana Fontenot, as Next Friend of CHANDLER SORRELLS, a Minor, PAT SORRELLS, and RITA SORRELLS,
Petitioners,

vs.

CITY of DALLAS, JOSEPH CUTRONA, WILLIAM READDY, and STANLEY GRIFFIS,
Respondents.

On Petition For a Writ Of Certiorari To The United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX EXHIBIT "A"

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Defendants City of Dallas, Joseph Cutrona, William Readdy, Stanley Griffis, Richard Hunt, Thomas Moore, Arnaldo Rivera, Bennie Click, Roland Gamez, and Joseph Vasquez have filed a motion for summary judgment in this civil rights case. The motion has been referred to United States Magistrate Judge Jeff Kaplan for recommendation pursuant to 28 U.S.C. § 636(b).

I.

The facts of this case are set forth at length in *Sorrells v. City of Dallas*, 192 F.R.D. 203, 204-06 (N.D. Tex. 2000). Succinctly stated, Dallas police officers were dispatched to an apartment complex to investigate a report of indecent exposure on September 17, 1998. Upon their arrival, the officers witnessed a nude male masturbating in the front seat of his car. The suspect, later identified as Shane G. Sorrells, did not respond when told to exit his vehicle. At that point, the officers decided to use pepper mace to force Sorrells out of his car. Sorrells appeared unaffected by the spray. The situation escalated when the officers forcibly removed Sorrells from the car and attempted to handcuff him. According to plaintiffs, one or more officers struck Sorrells repeatedly with a baton, kicked him, and maintained a chokehold for "five to eight minutes after he collapsed to the ground." Sorrells eventually lost consciousness and stopped breathing. Paramedics transported him to the hospital where he was pronounced dead.

The Sorrells family now sues various police officers, paramedics, supervisory officials, and the City of Dallas for civil rights violations under 42 U.S.C. §§ 1983 & 1985. They also assert state law claims for assault, battery, false imprisonment, intentional infliction of emotional distress, and negligence. Defendants move for summary judgment as

to all claims and causes of action. The issues have been briefed by the parties and the motion is ripe for determination.

II.

Summary judgment is proper when there is not geninue issue as to material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d (1986). A dispute is "genuine" if the issue could be resolved in favor of either party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128, 131 (5th Cir.), *cert. denied,* 113 S. Ct. 136 (1992). A fact is "material" if it might reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Matter of Gleasman,* 933 F.2d 1277, 1281 (5th Cir. 1991).

A movant who does not have the burden of proof at trial must point to the absence of a genuine fact issue. *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995); *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995). The burden then shifts to the non-movant to show that summary judgment is not proper. *Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir. 1992). The non-movant may satisfy this burden by tendering depositions, affidavits, and other competent evidence. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 113 S.Ct. 82 (1992). All evidence must be viewed in the light most favorable to the party opposing the motion. *Rosado v. Deters*, 5 F.3d 119, 122 (5th Cir. 1993); *Reid v. State Farm Mutual Automobile Insurance Co.*, 784 F.2d 578 (5th Cir. 1986). However, conclusory statements and testimony based on conjecture or subjective belief are not competent summary judgment evidence. *Topalian,* 945 F.2d at 1131.

III.

Defendants seek summary judgment on five grounds: (1) plaintiffs cannot establish their federal constitutional claims for use of excessive force, failure to intervene, failure to render aid, conspiracy, and denial of due process and equal protection; (2) the individual defendants are entitled to qualified immunity; (3) there is no basis for municipal liability against the City of Dallas; (4) the police and fire chiefs are not liable for the actions of their subordinates; and (5) defendants are immune from plaintiffs' state law claims.[1] The Court will consider these issues in turn.

IV.

The gravamen of plaintiffs' complaint is that various police officers used excessive force against Shane G. Sorrells. Plaintiffs also assert claims under federal law for failure to intervene, failure to render aid, conspiracy, and denial of due process and equal protection.

A.

An excessive force claim is analyzed under the "reasonableness" standard of the Fourth Amendment to the United States Constitution. *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L.Ed.2 443 (1989); *Ikerd v. Blair*, 101 F.3d 430, 433 (5th Cir. 1996). The Fifth Circuit has established a three-part test in such cases. A plaintiff must show that: (1) he suffered a significant injury; (2) resulting from force that was clearly excessive to the need for force; and (3) the force used was objectively unreasonable. *Goodson v. City of Corpus Christi,* 202 F.3d 730, 740 (5th Cir. 2000). The Court must view the totality of

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[1] Defendants also seek summary judgment on the grounds that the Dallas Police Department and Dallas Fire Department are not entities capable of being sued and that the City of Dallas is not liable for punitive damages. In their response, plaintiffs point out that they have not sued the Dallas Police Department or Dallas Fire Department. (Plf. Brief at 22 n. 21). The Court does not reach the issue of punitive damages because plaintiffs have failed to establish any of their claims against the City.

circumstances from the standpoint of a reasonable officer on the scene, paying particular attention to "whether the suspect pose[d] an immediate threat to the safety of the officers or others." *Stroik v. Ponseti,* 35 F.3d 155, 157-58 (5th Cir. 1994), *cert. denied,* 115 S. Ct. 1692 (1995), *citing Graham,* 109 S.Ct. at 1872.

The following facts are not in dispute. On September 17, 1998, Shane G. Sorrells parked his car behind an apartment complex at 3910 North Hall Street in Dallas, Texas. Sorrells isolated himself in the vehicle by locking the doors and rolling up the windows. Corporal Joseph Cutrona and Officer William Readdy were dispatched to the scene to investigate a report of indecent exposure. Upon their arrival, the officers observed Sorrells masturbating in the front seat of his car. The officers instructed Sorrells to exit the vehicle. Sorrells ignored their command and continued masturbating. The officers then called for backup. Before help arrived, Corporal Cutrona shot Oleoresin Capsicum ("OC") spray into the car.[2] Shortly thereafter, Sergeant Stanley Griffis arrived at the location. Sergeant Griffis borrowed an ASP baton from Officer Readdy and broke out the passenger side window of the car. Sorrells was cut by pieces of flying glass and began to bleed. Corporal Cutrona and Sergeant Griffis then used more OC spray on Sorrells, but he still refused to exit the vehicle. At that point, Corporal Cutrona unlocked the doors and attempted to pull Sorrells from the car. However, Sorrells was so slippery from sweat, blood, and OC spray that the officer could not get a firm grasp on his wrist. Corporal Cutrona and Officer Readdy were eventually able to remove Sorrells from the car and get him to the ground.

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[2] Oleoresin Capsicum spray, also known as pepper spray or pepper mace, is a chemical agent made from hot pepper extracts. The active ingredient, capsicum, is an inflammatory agent. Exposure to OC spray irritates the mucous membranes of the eyes, nose, throat, and lungs. It also causes dilation of the capillaries, which inhibits the ability to breathe.

A struggle ensued when the officers tried to handcuff the suspect. Sorrells resisted and attempted to leave the scene. Officer Readdy caught Sorrells after a brief chase and brought him down by using a Lateral Vascular Neck Restraint ("LVNR") hold. [3] Other officers stuck Sorrells with their batons in an attempt to bring him under control. At some point during this ordeal, Sorrells lost consciousness and stopped breathing. Paramedics administered CPR on the scene and transported Sorrells to Parkland Memorial Hospital. Despite efforts to revive him, Sorrells was pronounced dead on arrival. An autopsy revealed that Sorrells sustained a fractured larynx. The coroner initially ruled his death a homicide.

Defendants contend that their actions were objectively reasonable under the circumstances and therefore did not rise to the level of excessive force. In an affidavit prepared immediately following the incident, Sergeant Griffis stated that he decided to break out the car window and arrest Sorrells because "[w]ith the car running, I felt that the suspect could possibly put the car in gear. If he did that, he would have endangered himself, us, and any citizen in his path." (Plf. App. at 189). Sergeant Griffis did not consider covering the windshield with a blanket and "simply waiting [the suspect] out" because Sorrells might have had a weapon in the car. (*Id.* at 226).

Defendants also attempt to justify striking Sorrells with their batons and placing him in a neck hold. Sergeant Griffis stated that the suspect continued to masturbate even

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[3] A Lateral Vascular Neck Restraint, or LVNR hold, is one method used by police officers to restrain a resisting suspect. The three levels of LVNR that may be employed are: (1) a rear headlock; (2) compression until compliance is achieved; and (3) compression until the suspect is unconscious. DPD SPECIAL ORDER 97-05, § 903.01 (1997). An LVNR hold is considered safer than a bar-arm hold because it restricts only flow to the brain rather than the suspect's ability to breathe. (Plf. App. At 146, 184-85, 277-78).

after he was forcibly removed from the vehicle. Corporal Cutrona and Officer Readdy were unable to get control of the suspect, who was covered with OC spray and blood. Sergeant Griffis described Sorrells as "super strong, as if high on something." (*Id.* at 201). After Sorrells refused to comply with repeated verbal commands, Corporal Cutrona began striking him on the elbows and legs with an ASP baton. Sorrells was unfazed by the blows and continued to resist. (*Id.*)[4] He eventually jumped to his feet, spit in Corporal Cutrona's face, and ran away. (Def. App. at 5, 11, 17). Sorrells ran into an apartment complex between two parked cars. (*Id.* at 12). When confronted by the officers, Sorrells "continued to aggressively run at us and thrash his arms towards us." (*Id.* at 17). Corporal Cutrona struck Sorrells on the leg with his baton, but he continued to ignore orders to place his hands behind his back. Officer Readdy then placed a LVNR hold on the suspect. (*Id.*)

According to defendants, Sorrells continued to struggle after Officer Readdy applied the neck hold. (*Id.* at 12, 17-18, 21, 25). Corporal Cutrona tried to protect himself by striking Sorrells in the leg "several times" with his baton. (*Id.* at 12). He then noticed that "[d]ecedent's eyes start[ed] to close and his face beg[an] to slightly discolor." (*Id.*). Officer Readdy released the hold when Sorrells went to the ground. Still, the officers were unable to get Sorrells on his stomach so they could immobilize his arms. After struggling with the suspect for more than 15 minutes, Corporal Cutrona had almost no energy left. He explained:

> All I could think to do was to get on Decedent's back to prevent him from standing up and continuing to fight us. I got on his back while ordering him to stay on the ground. My right foot was on his right

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[4] According to Corporal Cutrona, Sorrells responded to the blows by stating "[t]hat feels good; f--- me up the a--." (Def. App. at 11).

> shoulder area, near the middle of his back, and my left foot was on his mid-back. I was trying to stand and balance myself, even though I could feel that Decedent was still trying to get up. If he was saying anything our commands drowned it out but he was definitely conscious and still resisting our attempts to handcuff him.

(*Id.* at 12-13). Corporal Cutrona, assisted by Officers Thomas Moore and Richard Hunt, eventually subdued and handcuffed the suspect. (*Id.* at 6, 13, 18, 21, 25). Several officers went to get treatment for their exposure to OC spray. After they left, Officer Hunt noticed that Sorrells had lost consciousness and stopped breathing. (*Id.* at 7, 13, 18, 21, 25, 28).

Plaintiffs have adduced considerable evidence to controvert defendants' version of the facts surrounding this incident. For example, Corporal Cutrona testified in his deposition that Sorrells' car was parked facing the patio of the apartment complex. (Plf. App. at 129). Officer Readdy parked his squad car directly behind Sorrells. (*Id.*) Thus, the officers effectively prevented Sorrells from moving his vehicle. This controverts Sergeant Griffis' contention that immediate action was required to minimize the risk of harm to officers and onlookers if Sorrells put his car in gear. Moreover, there is evidence in the record to suggest that Sorrells was not a threat to anyone. Dallas Police Detective Joe DeCorte admitted as much to members of the Sorrells family. (*Id.* 440-41). It is therefore questionable whether the officers were justified in using OC spray to remove Sorrells from his car. [5]

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[5] Dallas Police Department Special Order No. 97-05 provides, in relevant part, that "OC [s]pray will not be used on subjects who are using techniques of non-cooperation and those not posing a physical threat to anyone." (Plf. App. at 43).

There also is evidence that officers continued to strike and kick Sorrells after he was on the ground. One witness, Susan Oakey, observed an officer strike Sorrells with his baton. Sorrells was "very preoccupied and appeared to be unable to ward off the blows." (*Id.* at 385). Oakey saw the same officer kick Sorrells several times after he rolled over into a fetal position. At no time did Sorrells offer any resistance. (*Id.* at 386). Another witness, Robert Adelsberger, described the ferocity of the blows administered to Sorrells after officers removed him from his car:

> One of the officers who was approximately 6' – 6'1" tall started kicking the man. The other officer who was short, stocky, bald and had a mustache started beating the man with a baton. He was hitting him with side strokes and overhead strokes of the baton. At one point, he was bringing the baton back over his head and coming straight down on the man like he had an "ax handle." The officer hit him repeatedly, maybe 25-30 times, and to the point that the officer was breathing heavily and red in the face.

(*Id.* at 356). Adelsberger further stated that Sorrells, who was completely nude and barefooted, merely "tip-to[ed]" down a parking lot filled with rocks and debris. (*Id.* at 356). Oakey testified that Sorrells "stumble[d] off." (*Id.* at 384). This controverts the officers' testimony that Sorrells attempted to flee the scene. Even Corporal Cutrona conceded that Sorrells was not running at such a fast pace that it was hard to keep up with him. (*Id.* at 143). Officer Readdy described the pace as something less than a sprint. (*Id.* at 182). Sergeant Griffis said that Sorrells "wasn't trying to outrun us, at least in my appearance [sic]." (*Id.* at 230).

Finally, the facts and circumstances surrounding the chokehold used on Sorrells are in dispute. Corporal Cutrona admitted that he cornered the suspect between two cars and a fence. (*Id.* at 104, 123). This effectively negated any risk of flight. While Officer Readdy applied the LVNR hold, Corporal Cutrona continued to hit Sorrells with a baton. (*Id.* at 123). There is at least some evidence that Sorrells was not fighting or struggling with officers at the time. (*Id.* at 382). One witness said that the neck hold applied by Officer Readdy was so forceful that "[t]he officer was literally being carried by [Sorrells] due to the 'choke hold' and the officer's feet being off the ground." (*Id.* at 356). There is sufficient evidence in the record to suggest that these actions might be contrary to police department policy.[6]

Defendants cite *Wagner v. Bay City, Texas*, 227 F.3d 316 (5th Cir. 2000), for the proposition that the conduct of the police officers was not objectively unreasonable as a matter of law. *Wagner* also involved the death of a suspect while in police custody. In that case, the police were called to break up a fight at a fast-food restaurant. The suspect resisted the officers and was sprayed with pepper mace. Next, the officers handcuffed the suspect and placed him face-down on the pavement. There was conflicting evidence as to whether the suspect continued to struggle after that point. In any event, one of the officers placed his knee on the suspect's back and "kept pushing [his] neck and head to the ground" with a stick. Sometime during this ordeal the suspect passed out. Rather than take him to the hospital, the officers decided to transport the suspect to jail. He was carried to a squad car and placed on his stomach with his head turned toward the front of the vehicle. No one monitored his condition. When

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[6] Dallas Police Department Special Order No. 97-05 provides, in relevant part, that "[t]he LVNR will not be used on subjects who are using techniques of non-cooperation and not posing a physical threat to anyone." (Plf. App. at 44). In addition, the LVNR should only be used in "exigent circumstances" if the subject has been sprayed with Oleoresin Capsicum. (*Id.*).

the suspect arrived at the jail, the officers realized that he was not breathing. CPR was administered and the suspect was taken to the hospital where he later died. *Id.* at 318-19.

The district court determined that there were genuine issues of material fact as to whether the amount of force used against the suspect was objectively unreasonable. The Fifth Circuit disagreed. The court concluded that "nothing about the use of chemical spray or even a chokehold was objectively unreasonable conduct where the suspect physically resisted arrest. The officers' actions were all consistent with the idea that they merely were trying to restrain a violent individual." *Id.* at 324, *citing Estate of Phillips v. Milwaukee*, 123 F.3d 586, 593-94 (7th Cir. 1997). Thus, the court held that defendants were entitled to summary judgment on plaintiffs' excessive force claim.

The Court acknowledges *Wagner* but determines that the facts of this case are more analogous to *Gutierrez v. City of San Antonio*, 139 F.3d 441, 445 (5th Cir. 1998). In *Gutierrez*, the police confronted a suspect who appeared to be "high on some type of drugs." The suspect came toward the officers swinging his arms wildly and shouted that he had been shot. Although the suspect had numerous abrasions, no bullet wounds were found. The officers handcuffed the suspect "for his safety and mine." The situation escalated when paramedics attempted to transport the suspect to the hospital. At that point, the suspect began to push and kick one of the paramedics. The officers then decided to "hog-tie" the suspect and transport him in a squad car. It is not clear whether the suspect was placed in a face-down position in the rear seat or with his fact pointed toward the rear of the front seat. In any event, he was conscious and struggling when the officers set off for the hospital. Approximately ten minutes later, the suspect stopped struggling. He was unconscious by the time he arrived at the hospital. Medical personnel could not find a pulse and the suspect was later pronounced dead by an emergency room doctor. *Id.* at 443.

On those facts, the Fifth Circuit held that summary judgment was not proper on plaintiffs' excessive force claim. The court based its decision, in part, on a well-circulated report issued by the San Diego Police Department on the dangers of Sudden Custody Death Syndrome ("SCDS"). That report concluded that SCDS could be caused by the combination of: (1) drug use; (2) positional asphyxia; (3) cocaine psychosis; and (4) hot-tying or carotid choke holds. Because there was conflicting evidence as to whether these conditions existed, the court held that it was impossible to determine whether the officers' actions were objectively reasonable under the circumstances. *Id.* at 446.

Similar considerations preclude summary judgment in favor of Sergeant Griffis, Corporal Cutrona, and Officer Readdy. The evidence shows that at least one officer believed that Sorrells was "high on something." (Plf. App. at 201).[7] He was handcuffed and placed face-down on the ground while Corporal Cutrona stood on his back "to prevent him from standing up. . ." (Def. App. at 12). Although Sorrells was not hog-tied, he was placed in an LVNR or carotid neck hold until his fact turned red. (Plf. App. at 382). Among the factors that contributed to his death were cocaine abuse, restraint, and blunt force injuries. (*Id.* at 94-95). These facts are more akin to *Gutierrez* than *Wagner*. Moreover, there is conflicting evidence regarding the amount of resistance offered by Sorrells and whether he presented a danger to the officers or others. A jury must resolve these conflicts in order to determine whether the level of force used was clearly excessive and objectively unreasonable under the circumstances.[8]

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[7] Toxicology reports confirmed that Sorrells ingested a large amount of cocaine, which also may explain his aberrant behavior. (Plf. App. at 89).

[8] Sergeant Griffis is not insulated from liability merely because he did not personally strike Sorrells with a baton or apply a chokehold. The evidence shows that Sergeant Griffis used an entire canister of OC

The Court reaches a different conclusion with respect to Officers Hunt, Moore, and Rivera. The evidence shows that these officers arrived on the scene after Sorrells had been taken down by Officer Readdy. (*Id.* at 239, 247, 252, 257, 266, 268-70). Although there is conflicting evidence as to the resistance offered by the suspect up to that point, there is no dispute that Sorrells struggled when the officers tried to place handcuffs on him. (*Id.* at 104-5, 110-11, 160, 202, 239, 247, 253, 257, 266, 268-70, 343, 356-57, 360, 371). Moreover, Officers Hunt, Moore, and Rivera merely forced Sorrells onto his stomach so he could be restrained. The use of physical force to secure compliance from a suspect who resists arrest is not objectively unreasonable. *See Sappington v. Bartee,* 195 F. 3d 234, 237 (5th Cir. 1999) (officer justified in using force to arrest uncooperative suspect); *Colston v. Colston*, 130 F.3d 96, 100 (5th Cir. 1997) (use of force objectively reasonable when suspect poses danger to arresting officer). Accordingly, these officers are entitled to summary judgment.

B.

The failure to protect the suspect from the use of excessive force by others may give rise to liability under 42 U.S.C. § 1983. *See Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995); *Harris v. Chancelor,* 537 F.2d 203, 205-06 (5th Cir. 1976). As discussed above, there is sufficient evidence to preclude summary judgment in favor of Sergeant Griffis, Corporal Cutrona, and Officer Readdy as to this claim. All three officers were present when Sorrells was subjected to the use of force. None intervened to protect him. However, Officers Hunt, Moore, and Rivera did not arrive on the scene until after Sorrells had bee sprayed, beaten, kicked, and taken down with an LVNR hold. These officers are entitled to summary judgment as to this claim.

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spray on Sorrells, which hampered his breathing and may have contributed to his death. (Plf. App. at 189, 428-39).

C.

Plaintiffs also contend that the police officers and paramedics failed to render medical aid to Sorrells. This claim is governed by the "deliberate indifference" standard of the Eighth Amendment to the United States Constitution. U.S. CONST. amend. VIII; *Estelle v. Gamble*, 429 U.S. 97, 105, 97 S. Ct. 285, 292, 50 L.Ed.2d 251 (1976). Plaintiffs must show that the police officers were aware of a substantial risk of serious harm and failed to take reasonable measures to abate that risk. *Hare v. City of Corinth*, 74 F.3d 633, 649 (5th Cir. 1996), *citing Farmer v. Brennan*, 511 U.S. 825, 847, 114 S. Ct. 1970, 1984, 128 L.Ed.2d 811 (1994).

The summary judgment evidence shows that two paramedics arrived on the scene at the same time as Officers Hunt and Moore. Before he was handcuffed, Sorrells stated he could not breathe. (Plf. App. at 338, 342, 345). One of the paramedics attributed the comment to his struggle with police officers. (*Id.* at 339). When the other paramedics approached the suspect, Sorrells "cussed" and spit at him. (*Id.* at 242, 281, 346, 349). Corporal Cutrona and Officer Readdy went to the ambulance to receive treatment for their exposure to OC spray. (*Id.* at 105, 111, 158, 170). At that point, Sorrells was still breathing and muttering. (*Id.* at 105, 111, 158, 163, 170). Officer Hunt then yelled that Sorrells had stopped breathing. (*Id.* at 105, 111, 158, 170, 198, 224, 242-43, 249, 340, 346). Prior to that time, Sorrells' color had returned to normal. (*Id.* at 106, 111).

Defendants contend that the paramedics immediately responded to Officer Hunt's outcry and began to administer CPR. (*Id.* at 105, 111, 158, 170, 198, 224, 242-43, 249, 340, 346). Plaintiffs disagree. They claim that one of the paramedics looked at Sorrells but "went back to the ambulance in an unconcerned manner." (Plf. Brief at 19). According to plaintiffs, neither paramedic made physical contact with Sorrells or attempted CPR "until nearly ten minutes after Officer Readdy released the choke-hold and

only when Mr. Sorrells' condition became so severe that his skin turned blue." (*Id.*)

These discrepancies can be easily reconciled. Although Officer Moore did say that one of the paramedics knelt down over Sorrells "but then went back to the ambulance in an unconcerned manner," there is no evidence that Sorrells was in distress at the time. (Plf. App. at 270). To the contrary, the evidence shows that paramedic started CPR within *one minute* after Sorrells went quiet and stopped breathing. (*Id.* at 270, 285). Plaintiffs have failed to adduce any evidence that the police officers and paramedics on the scene failed to render appropriate medical treatment to Sorrells or were deliberately indifferent to his medical needs. Defendants are entitled to summary judgment as to this claim.

D.

Plaintiffs further allege that defendants conspired to deprive Sorrells and his family of their civil rights "[a]s a result of their concerted and malicious treatment of Mr. Sorrells. . ." (Plf. Compl. ¶ 4.07). Defendants correctly point out that such vague and conclusory allegations will not defeat a motion for summary judgment. *See Young v. Biggers*, 917 F.2d 873, 877 (5th Cir. 1990); *Lynch v. Cannatella*, 810 F.2d 1363, 1369-70 (5th Cir. 1987). In an attempt to salvage their conspiracy claim, plaintiffs now contend that "[t]he investigation that took place *after* [Sorrells'] death was such a sham as to constitute no investigation at all and DPD's conduct in choosing to attack his public reputation rather than . . . interviewing civilian witnesses to his death, demonstrates a conspiracy among the officers, DPD, and Dallas." (Plf. Brief at 20) (emphasis added).

The Court need not decide whether an actionable conspiracy exists when police officers conceal important facts about a crime from its victims. *But see Vasquez v.*

Hernandez, 60 F.3d 325, 328 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 1545 (1996) (holding that such a conspiracy is actionable under section 1985). This theory, raised for the first time in response to defendants' motion for summary judgment, is not alleged anywhere in the complaint. Accordingly, the conspiracy claim fails as a matter of law. *See Romero v. Alexander Chemical Employee Health Care Plan*, 1999 WL 498638 at *5 n.4 (N.D. Ill. July 2, 1999) (plaintiff may not raise issue for first time in response to summary judgment motion); *Nelson v. United States*, 1994 WL 247214 at *5 (E.D. Mich. Mar. 30, 1994) (defense waived when asserted in response to motion for summary judgment); *Ovitz v. Jefferies & Co., Inc.*, 102 F.R.D. 242, 243 (N.D. Ill. 1984) (response to motion for summary judgment not sufficient to put theory of recovery in issue).

E.

Plaintiffs generally allege violations of their due process and equal protection rights. (Plf. Compl. ¶¶ 4.03-4.04). Defendants contend that these claims are duplicative of other claims raised in the pleadings and should be dismissed for that reason. Plaintiffs wholly fail to address this argument in their response.[9] Accordingly, defendants are entitled to summary judgment.

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[9] The closest plaintiffs come to articulating a due process claim is their argument that Sorrells was not provided adequate medical care as a pretrial detainee. (Plf. Response at 19). Although such a claim may arise under the due process clause, it is properly analyzed under the "deliberate indifference" standard of the Eighth Amendment. *See Hare*, 74 F.3d at 649. The Court has previously determined that defendants were not deliberately indifferent to Sorrells' medical needs.

Plaintiffs' equal protection argument is also flawed. In order to establish an equal protection violation, plaintiffs must show that: (1) a state actor intentionally discriminated against Sorrells because of his membership in a protected class; (2) defendants were motivated by animus or ill-will; and (3) no rational basis existed for the disparate treatment. *See Village of Willowbrook v. Olech*, 528 U.S. 562, ___, 120 S. Ct. 1073, 1074-75, 145 L.Ed.2d 1060 (2000). Here, plaintiffs fail to

F.

The individual defendants also seek summary judgment on their qualified immunity defense. Police officers are entitled to qualified immunity if their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Gutierrez*, 139 F.3d at 455, *citing Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The Supreme Court has clarified the analytical structure under which a claim of qualified immunity should be addressed. *Siegert v. Gilley*, 500 U.S. 226, 231-33, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). First, the court must determine whether the plaintiff has alleged the deprivation of an actual constitutional right. *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692, 1697, 143 L.Ed.2d 818 (1999); *Siegert*, 111 S.Ct. at 1793. If the plaintiff alleges a constitutional deprivation, the court must then decide whether that right was clearly established if "the contours of that right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). The second prong of this inquiry necessarily depends on the unique circumstances of each case. *Id.* However, the subjective intent of the police officer is irrelevant. *Id.*

The Court has previously determined that plaintiffs have alleged an excessive force claim against Sergeant Griffis, Corporal Cutrona, and Officer Readdy. There is no question that this is a "clearly established" constitutional right. *See Gutierrez*, 139 F.3d at 446, *citing Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 1701, 85 L.Ed.2 1 (1985) (use of deadly force violates Fourteenth Amendment

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satisfy any element of this test. There is absolutely no evidence that Sorrells belonged to a protected class, that he was treated differently than others similarly situated, or that defendants were motivated by animus or ill-will towards him.

unless officer has probable cause to believe that suspect poses threat of serious physical harm). Thus, the only question is whether the conduct of these officers was objectively unreasonable under the circumstances.

As noted by the Court in an earlier opinion, "the elements of plaintiffs' excessive force claim coincide in large part with the elements of defendants' qualified immunity defense." *Sorrells*, 192 F.R.D. at 209, *citing Heitschmidt v. City of Houston*, 161 F.3d 834, 839 (5th Cir. 1998). An essential element in both is whether defendants' actions were objectively unreasonable under the circumstances. *See Anderson*, 107 S. Ct. at 3038-39 (qualified immunity); *Johnson v. Morel*, 876 F.2d 477, 480 (4th Cir. 1989)(excessive force). There are simply too many disputed facts to permit resolution of this issue by way of summary judgment. That is not to say defendants are not entitled to qualified immunity. The issue will have to be resolved at trial. *See Roberts v. Marino*, 656 F.2d 1112, 1114 (5th Cir. 1981) (jury required when evidence amounts to "outright swearing match" between parties).

V.

The City of Dallas argues that plaintiffs have failed to establish any basis for municipal liability under 42 U.S.C. § 1983. Specifically, the City maintains that plaintiffs have failed to identify an official policy or custom which resulted in a constitutional injury.

A.

A municipality is not liable for the constitutional torts of its employees under the theory of *respondeat superior*. *Monell v. Department of Social Services of New York*, 436 U.S. 558, 690-94, 98 S. Ct. 2018, 2035-37, 56 L.Ed.2d 611 (1978); *Benavides v. County of Wilson*, 955 F.2d 968, 972 (5th Cir.), *cert. denied*, 113 S. Ct. 79 (1992). However, liability may be imposed under 42 U.S.C. § 1983 where an official policy, custom, or practice results in the deprivation

of a federally protected right. *Monell*, 98 S. Ct. at 2037-38. A plaintiff must show that: (1) the policy was inadequate; (2) the policymakers were deliberately indifferent to the constitutional rights of its citizens; and (3) the policy directly caused the injury. *City of Canton v. Harris*, 489 U.S. 378, 390-92, 109 S. Ct. 1197, 1205-06, 103 L.Ed.2d 412 (1989); *Benavides*, 955 F.2d at 972. In cases where the course of action was deliberately chosen by a decision maker with final authority to establish municipal policy, a single act is sufficient to give rise to a civil rights violation. *See Pembaur v. City of Cincinnati*, 475 U.S, 469, 480-81, 106 S. Ct. 1292, 1299, 89 L.Ed.2d 452 (1986).

A different standard applies where the challenged conduct relates to informal policies or a custom of behavior among municipal employees. In such cases, a single constitutional violation is not actionable under section 1983. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 820-24, 105 S. Ct. 2427, 2434-36, 85 L.Ed.2d 791 (1985). A plaintiff must establish "a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent [misconduct] or that serious incompetence or misbehavior was general or widespread . . ." *Languirand v. Hayden*, 717 F.2d 220, 227-28 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2656 (1984). The critical inquiry is whether the growing body of official policymaker had actual or constructive knowledge of persistent and widespread violations of constitutional rights. *See Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 3476 (1985).

B.

Plaintiffs allege that the City of Dallas maintains a number of unconstitutional policies which lead to the death of Shane G. Sorrells. These include: (1) allowing the use of deadly force on non-threatening suspects who do not pose a flight risk; (2) sanctioning the use of deadly force against mentally impaired suspects who present no threat of

immediate physical harm; (3) allowing suspects to be restrained in a prone position following the use of force; (4) failing to require supervisors to monitor suspects placed in such a position; (5) condoning the failure of police officers and emergency medical personnel to intervene and render aid following the improper use of force; (6) failing to adequately train police officers and paramedics; and (7) failing to investigate incidents involving the use of deadly force or discipline responsible parties. (Plf. Brief at 22).

Not surprisingly, plaintiffs do not identify any formal policy which they allege to be unconstitutional on these grounds. Instead, plaintiffs argue that the actions of police and fire officials *following this incident* create a fact issue as to actual City policy. Plaintiffs cite an investigation conducted by the Internal Affairs Division of the Dallas Police Department wherein investigators determined that only Corporal Cutrona and Sergeant Griffis violated departmental policies.[10] (Plf. App. at 500, 523-44). Deputy Chief J.C. Martinez and Chief Terrell Bolton rejected the findings as to Sergeant Griffis (*Id.* 558). As a result, only Corporal Cutrona was disciplined. [11] (*Id.* 554-55). Plaintiffs further note that the Dallas Fire Department did not investigate the conduct of their paramedics. According to plaintiffs, the failure to conduct an adequate investigate or discipline the responsible parties suggests that the City tacitly approved of the conduct at issue in this case. (Plf. Brief at 23-24).

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[10] The Internal Affairs investigator concluded that Corporal Cutrona "used unnecessary or inappropriate force" and that Sergeant Griffis "failed to appropriately engage in and control a police incident under this supervision." (Plf. App. at 500, 532-36).

[11] Corporal Cutrona was suspended without pay for one day. (Plf. App. at 554-55).

This circular argument obscures the fact that plaintiffs seek to impose liability on the City for actions taken by individual police officers and paramedics on the scene. Plaintiffs present no evidence of "a pattern of similar incidents" involving the use of deadly force on mentally impaired suspects or the failure to render appropriate medical care after such force is used. The single, isolated incident involving Sorrells is insufficient to show that an official policy or custom existed. As the Supreme Court has stated:

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker . . . *But where the policy relied upon is not itself unconstitutional*, considerably more proof than the single incident will be necessary *in every case* to establish both the requisite fault on the part of the municipality, and the casual connection between the "policy" and the constitutional deprivation.

Tuttle, 105 S.Ct. at 2436 (emphasis added). Such is the case here. One incident of excessive force cannot sustain the interference that the City sanctioned or was indifferent to such constitutional abuses. *See Campbell v. City of San Antonio*, 43 F.3d 973, 977 (5th Cir. 1995) (single incident insufficient to establish custom); *Fraire v. City of Arlington*, 957 F.2d 1268, 1278 (5th Cir.), *cert. denied*, 113 S. Ct. 462 (1992) (custom or policy requires pattern of similar incidents). Plaintiffs cannot bootstrap liability against the

City in this fashion. Summary judgment is proper as to this claim.[12]

VI.

Plaintiffs allege that Dallas Police Chief Bennie Click and Dallas Fire Chiefs Roland Gamez and Joseph Vasquez "adopted, approved, ratified, and silently acquiesced" in the policies followed by the police officers and paramedics who encountered Shane Sorrells. (Plf. Compl. ¶¶ 4.08-4.17 & 4.18-4.27). This claims fails for two reasons. First, there is no evidence that the department chiefs personally participated in acts that caused a constitutional deprivation. *See Jett v. Dallas Independent School District,* 491 U.S. 701, 736, 109 S. Ct. 2702, 2723, 105 L.Ed.2d 598 (1989); *Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir.), *cert. denied,* 104 S. Ct. 248 (1983) (personal involvement is an essential element in civil rights cause of action). Second, plaintiffs have not established the existence of an unconstitutional policy or custom which led to Sorrells'

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[12] Plaintiffs protest that they were precluded from taking any discovery on certain aspects of their municipal liability claim by virtue of a court order dated February 25, 2000. (Plf. Brief at 24; Hamilton Aff. ¶ 2.1). This argument is rather disingenuous. In its order granting in part and denying in part plaintiffs' motion to lift a discovery stay, the Court wrote:

> [M]uch of the discovery requested by plaintiffs is directed to the City of Dallas and goes to the issue of municipal liability. A municipality is not entitled to qualified immunity. [Citations omitted]. Therefore, *plaintiffs should be allowed to conduct discovery in order to pursue their claims against this defendant.* [Citations omitted].

Sorrells, 192 F.R.D. at 210 (emphasis added). The Court allowed plaintiffs to conduct full discovery on all aspects of their municipal liability claim. Plaintiffs have no one but themselves to blame for failing to take advantage of that opportunity.

death. Accordingly, these defendants are entitled to summary judgment.[13]

VII.

Finally, defendants seek summary judgment on plaintiffs' state law claims for assault, battery, false imprisonment, intentional infliction of emotional distress, and negligence. The City contends that these claims are barred by the doctrine of sovereign immunity. The individual defendants claim official immunity.

A.

Under Texas law, a municipality is not liable for the torts of its agents unless there is a constitutional or statutory waiver of immunity. *Mt. Pleasant Independent School District v. Estate of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989). The Texas Tort Claims Act waives sovereign immunity if certain conditions are met. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.102, *et seq.* (Vernon 1986). The statute provides for a waiver of immunity in cases of "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant

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[13] Even if plaintiffs were to establish the existence of an unconstitutional policy, they have not shown that the department chiefs are "policymakers." The Dallas City Charter provides that "all powers conferred on the city shall be exercised by a city council . . . unless otherwise provided by law." DALLAS CITY CHARTER, Ch. III, § 1 (1993). The council is required to appoint a city manager who acts as chief administrative and executive officer. *Id.*, Ci. VI, §§ 1-2. Department chiefs are appointed by and directly responsible to the city manager. *Id.*, Ch. VI, § 2-(3). The police chief has ultimate responsibility for the "administration, command and external relations of the police department." (Plf. App. at 7). However, the city council and city manager are authorized to inquire into and investigate the conduct of any city department. DALLAS CITY CHARTER, Ch. III, § 18. Absent evidence to the contrary, the Court must assume that policymaking authority resides with the City's governing body. *See Atkins v. City of Carrollton*, 1997 WL 160297 at *4 (N.D. Tex. Mar. 27, 1997)(Fitzwater, J.); *Lowery v. Redington*, 1997 WL 10018 at *10 (N.D. Tex. Jan. 6, 1997) (Solis, J.).

according to Texas law." *Id.* § 101.021; *Evans v. City of Marlin,* 986 F.2d 104, 108-09 (5th Cir. 1983). However, immunity is not waived for "assault, batter, false imprisonment, or any other intentional tort." TEX. CIV. PRAC. & REM. CODE ANN. § 101.057; *Gillum v. City of Kerrville*, 3 F.3d 117, 125 (5th Cir. 1993), *cert. denied,* 114 S. Ct. 881 (1994).

It is clear that the City is not liable for the intentional conduct of its employees. Although the negligent conduct of police officers and paramedics may subject the City to liability under the Texas Tort Claims Act, plaintiffs have failed to adduce any evidence to support such a claim. In fact, they do not even brief the issue in their response to defendants' motion for summary judgment. The City is entitled to summary judgment on its sovereign immunity defense.

B.

Municipal employees are immune from suit for discretionary acts performed in good faith while acting within the scope of their authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). This legal analysis is the same under both federal and state law. *Cantu v. Rocha*, 77 F.3d 795, 808 (5th Cir. 1996). The issue is "whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." *Chambers*, 883 S.W.2d at 656, *quoting Swint v. City of Wadley*, 5 F.3d 1435, 1441-42 (5th Cir. 1993).

The Court has already determined that genuine issues of material fact preclude summary judgment in favor of Sergeant Griffis, Corporal Cutrona, and Officer Readdy on their federal immunity defenses. These same fact issues also preclude summary judgment on the grounds of official immunity. However, there is no evidence that any of the

other defendants acted in an objectively unreasonable manner. Therefore, summary judgment is proper as to those defendants.

RECOMMENDATION

Defendants' motion for summary judgment should be granted in part and denied in part. Plaintiffs should be allowed to prosecute their excessive force claim, failure to protect claim, and plain state law claims against Sergeant Stanley Griffis, Corporal Joseph Cutrona, and Officer William Readdy. To that extent, defendants' motion for summary judgment should be granted in all other respects.

DATED: December 15, 2000.

/s/ Jeff Kaplan
JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE

SUPPLEMENTAL APPENDIX EXHIBIT "B"

ORDER

After making an independent review of the pleadings, files and records in this case, and the Findings and Recommendations of the United States Magistrate Judge, I am of the opinion that the Findings and Conclusions of the Magistrate Judge are correct, except as described below.

The Court finds that the magistrate misstated the standard with respect to the use of excessive force in the Fifth Circuit. The standard the Fifth Circuit has established is a three-part test. A plaintiff must show that: (1) he suffered a significant injury; (2) resulting from force that was clearly excessive to the need for force; and (3) the force used was objectively unreasonable. *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000).

The magistrate's reliance on *Gutierrez v. City of San Antonio,* 139 F.3d 441, 445 (5th Cir. 1998) is also misplaced since that case was specifically limited to situations involving a drug induced defendant, who had been hog-tied. The Defendants' reliance on *Wagner v. Bay City*, 227 F.3d 316 (5th Cir. 2000), is also inapplicable, however, since *Wagner* involved an attempt by the officers to maintain control of a combative person resisting arrest. Here, a fact issue exists as to the amount of force used by the officers and the necessity of the force used while Sorrells was not offering resistance, according to the witnesses.

The use of the wrong standard and the reliance on *Gutierrez*, however, do not affect that outcome of this Court's decision.

Accordingly, the Findings and Recommendation of the magistrate court are hereby adopted as the Findings and Conclusions of the Court. Defendants' Objections are hereby **DENIED** and Plaintiffs' Objections are hereby **DENIED.**

So Ordered.

Signed this 30th day of March, 2001.

/s/ Jorge A. Solis
Jorge Solis
United States District Judge

No. 02-641

NOV 25 2002

In The

Supreme Court of the United States

ESTATE OF SHANE G. SORRELLS, by and through its independent executrix, Sheryl Thostenson, DANA FONTENOT, as next friend of Chandler Sorrells, a minor, PAT SORRELLS, and RITA SORRELLS,

Petitioners,

v.

CITY OF DALLAS, JOSEPH CUTRONA, WILLIAM READDY, and STANLEY GRIFFIS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners assert that the only element at issue in this proceeding regarding municipal liability under 42 U.S.C. § 1983 is whether they have established the existence of a municipal policy. (Pet. at i.) The City of Dallas ("City") also argued in the courts below, however, that Petitioners failed to establish the other elements necessary for municipal liability. But because the court of appeals correctly held that Petitioners had failed to identify a municipal policy that resulted in a constitutional violation, it was unnecessary for that court to address the other elements. Thus, while the only issue presented in this Petition is whether Petitioners have identified a municipal policy, it is not the only issue preventing Petitioners from overcoming the City's entitlement to summary judgment.

The questions presented by Petitioners are properly characterized by the following single question:

> 1. Does the court of appeals' holding that Petitioners failed to identify a municipal policy that caused a constitutional violation, along with that court's concomitant refusal to hold that a police chief's adoption of the findings and recommendations of an internal affairs investigation into an officer's conduct constitutes a ratification of or policy statement regarding that conduct, merit review by this Court?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the court of appeals are the Estate of Shane G. Sorrells, by and through its independent executrix Sheryl Thostenson, Dana Fontenot, as next friend of Chandler Sorrells, a minor, Pat Sorrells, and Rita Sorrells, who are appellees and cross-appellants in the court of appeals and plaintiffs in the district court; the City of Dallas, which is cross-appellee in the court of appeals and defendant in the district court; and Joseph Cutrona ("Cutrona"), William Readdy ("Readdy"), and Stanley Griffis ("Griffis"), who are appellants in the court of appeals and defendants in the district court.

In addition, the individual Respondents in this proceeding, Cutrona, Readdy, and Griffis,[1] are the petitioners in No. 02-559, filed in this Court on October 8, 2002, docketed on October 10, 2002, and in which the Petitioners herein are the respondents. That petition, which is based on the same incident and seeks review of the same court of appeals' judgment as the petition in the instant proceeding, concerns the court of appeals' disposition of the individual officers' interlocutory appeal of the denial of their motion for summary judgment based on qualified immunity.

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[1] Although Petitioners have named Cutrona, Readdy, and Griffis as Respondents, Petitioners' appeal in the court of appeals involved only the summary judgment granted in favor of the City. Nevertheless, even though the City is the only proper Respondent to the Petition in this Court, this brief in opposition is submitted on behalf of all named Respondents.

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CITATIONS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The per curiam opinion of the court of appeals, No. 01-10610, is not reported and is attached as Exhibit A to the Petition. (App. at 1-10.)[2] The district court's order in Civil Action No. 3:99-CV-1185-P is not reported. (Supp. App. at 25-26.) The findings and recommendation of the United States magistrate judge in the district court action is not reported. (Supp. App. at 1-24.)

BASIS FOR JURISDICTION IN THIS COURT

The judgment of the court of appeals was entered on July 10, 2002. Respondents agree with Petitioners' statement regarding this Court's jurisdiction.

CONSTITUTIONAL PROVISIONS, STATUTES, AND OTHER AUTHORITIES INVOLVED IN THE CASE

Respondents disagree with Petitioners' assertion that the Petition involves the First, Fifth, and Eighth Amendments to the United States Constitution, or the Due Process or Equal Protection Clauses of the Fourteenth Amendment. The following constitutional provisions, statutes, and other authorities are involved in the case:

[2] "App." refers to the Appendix attached to the Petition. "Supp. App." refers to the Supplemental Appendix filed by Petitioners.

(1) U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(2) U.S. Const. amend. XIV, § 1 (in pertinent part)

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .

(3) 42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall

be considered to be a statute of the District of Columbia.

(4) Rule 10, Supreme Court Rules

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

. . . .

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of

erroneous factual findings or the misapplication of a properly stated rule of law.

(5) Rule 15(2), Supreme Court Rules (in pertinent part)

In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition.

(6) Rule 56(b), Federal Rules of Civil Procedure

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(7) Rule 56(c), Federal Rules of Civil Procedure (in pertinent part)

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(8) Dallas City Charter ch. III, § 1 (in pertinent part)

> Except as otherwise provided by this Charter, all powers conferred on the city shall be exercised by a city council. . . .

(9) Dallas City Charter ch. VI, § 1 (in pertinent part)

> The council shall appoint a city manager, who shall be the chief administrative and executive officer of the city. . . . The city manager . . . shall be removable at the will and pleasure of the council upon a two-thirds vote of the members of the council. . . .

(10) Dallas City Charter ch. VI, § 2 (in pertinent part)

> The powers and duties of the city manager shall be as follows:
>
> (1) To be responsible to the council for the proper administration of all the city affairs placed in his hands, and shall to that end appoint and employ all directors of departments and other employees not otherwise provided for in this Charter or by ordinance. Appointments made by him shall be on the basis of executive and administrative experience and ability and of training fitness and efficiency of such appointees in the work which they are to administer. All such directors of departments shall be immediately responsible to the city manager and may be removed by him at any time.
>
> . . . .

(3) Except as otherwise provided by the Charter of the City of Dallas, to appoint and remove all heads of departments. . . .

(4) To exercise control over all departments and subdivisions thereof created by the Charter, or that may hereafter be created by the council, except as hereinafter provided.

(11) Dallas City Charter ch. XII, § 2 (in pertinent part)

The chief of police shall:

(1) have immediate direction and control of the police department, subject to the supervision of the city manager, and also subject to such rules, regulations and orders as the city manager may prescribe. . . .

(12) Dallas City Charter ch. XII, § 4

The chief of police shall have the right to suspend for a definite time or discharge any of the officers or employees who may be under the chief's jurisdiction and control for incompetence, neglect of duty, immorality, drunkenness, or failure to obey orders given by the proper authority, or the orders, rules, and regulations promulgated by the chief of police. If any officer or employee is suspended or discharged, as herein provided, the chief of police shall forthwith in writing certify the fact, together with the cause for the action, to the city manager. The officer or employee suspended or discharged shall have five days

> from receipt of notice of such action within which to demand a hearing before the city manager, but such demand must be made in writing. If demanded, the city manager shall proceed to inquire into the cause of the suspension or discharge and render judgment thereon, which judgment, if the charge is sustained, may be suspension, reduction in rank, discharge, or such modification or amendment as may seem just and equitable to the city manager under all the facts and circumstances of the particular case. Such judgment is final unless a discharged officer or employee desires to exercise the right of a public hearing before a trial board as provided by this Charter.

STATEMENT OF THE CASE

Except as follows, Respondents do not dispute, for purposes of the Petition, Petitioners' Statement of the Case.

Petitioners allege that when Cutrona and Readdy first encountered Shane G. Sorrells ("Sorrells"), Sorrells was high on cocaine, nude, masturbating, and disoriented. (Pet. at 2.)[3] The record does not support the allegation or

[3] Petitioners cite the court of appeals' opinion and the report of the Dallas Police Department Internal Affairs Division, contained in their Appendix, as support for their factual allegations regarding the underlying incident. They do not cite any other summary judgment evidence. Because the determination of those underlying facts is not necessary to the questions presented in the Petition, Respondents have likewise not cited other portions of the summary judgment evidence.

(Continued on following page)

inference that Cutrona and Readdy knew or believed when they first encountered Sorrells that he was high on cocaine or disoriented.

Respondents dispute the allegations in the last paragraph of page 3 of the Petition. The three backup officers did not arrive until Sorrells had already moved across the alley to the second parking lot. (*See* Pet. at 3.) The struggle involving the officers and Sorrells was not "one-sided," and Respondents dispute that any of the officers struck Sorrells between 25 and 30 times with a baton, (*see id.*), although Respondents acknowledge that Petitioners' summary judgment evidence contains a statement, to which Respondents objected in the courts below, to that effect from a civilian witness. And while the individual Respondents did use strikes on Sorrells, their "hit[s] and kick[s]," (*see id.*), were reasonable attempts to restrain and gain compliance from Sorrells.

Respondents dispute Petitioners' allegation that Readdy used a "chokehold" on Sorrells, and while he did use a Lateral Vascular Neck Restraint ("LVNR"), Respondents dispute Petitioners' allegation that it was administered "so poorly." (*See id.* at 4.) Respondents further dispute Petitioners' allegation that it would be difficult, if not impossible, to apply a Lateral Vascular Neck Restraint ("LVNR") to a struggling individual without putting compression across the windpipe. (*See id.* at 4 n.2.) Respondents also dispute Petitioners' allegation that no one

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Those underlying facts could bear on the issues before the Court if certiorari is granted, however, so Respondents address the perceived misstatements of fact at this time as required by Rule 15(2) of the Supreme Court Rules.

on the scene applied CPR. (*See id.* at 4.) In addition, there is no evidence in the summary judgment record to support Petitioners' allegation that an officer "crushed Mr. Sorrells' windpipe." (*See id.*) Likewise, the allegation that "[a]n autopsy revealed that he had suffered a crushed larynx," (*see id.* at 4), mischaracterizes the autopsy report, which stated that Sorrells had suffered fractures to the larynx, not a "crushed" larynx, and does not state that those fractures caused his death.

Respondents dispute any allegation or inference by Petitioners that the Dallas Police Department's ("DPD") general orders, code of conduct, or operating procedures are municipal policies. (*See id.* at 5-6.) This allegation is addressed more fully in the arguments section of this brief. Respondents further dispute Petitioners' allegation that the internal affairs investigation of the incident did not address DPD's procedures regarding the use of OC spray, an LVNR, or other uses of force. (*See id.* at 5.)

Respondents dispute Petitioners' allegations that the City has delegated policymaking authority to the Chief of Police "and/or" police department, and that the Chief of Police is "the highest ranking and final authority for matters of DPD, and therefore Dallas, police procedures and policies." (*See id.* at 6.) Indeed, the very provision of the Dallas City Charter that Petitioners quote states that the Police Chief's direction and control of the police department is "'subject to the supervision of the city manager, and also subject to such rules, regulations, and orders as the city manager may prescribe. . . .'" (*Id.* at 6

(quoting Dallas City Charter ch. XII, § 2(1)).) [4] These allegations are addressed more fully in the arguments section of this brief.

ARGUMENTS FOR DENYING THE PETITION

A. The Court of Appeals' Holding that Petitioners Failed to Identify a Municipal Policy that Caused a Constitutional Violation, Along with that Court's Concomitant Refusal to Hold that a Police Chief's Adoption of the Findings and Recommendations of an Internal Affairs Investigation into an Officer's Conduct Constitutes a Ratification of or Policy Statement Regarding that Conduct, Does Not Merit Review by this Court

1. Petitioners Have Not Established a Compelling Reason for Granting the Writ

Petitioners request that this Court review the court of appeals' opinion affirming the summary judgment in favor of the City. (Pet. at i, 1.) Rule 10 of the Supreme Court Rules provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither

[4] The magistrate judge, in a footnote to his recommendation that summary judgment be granted in favor of the City, stated that, even if Petitioners had identified an unconstitutional policy, they had not shown that the City's department chiefs are policymakers. (Supp. App. at 22 n.13.)

> controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> >
> > . . . .
> >
> > (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10. Petitioners have not asserted that the writ should be granted for any of the reasons set forth in Rule 10; instead, they argue that a writ is appropriate "because citizens require guidance from this Court regarding the *external* significance of the results of an [sic] IA findings, recommendations, and reports – to what extent to [sic] they effect [sic] the relationship between the citizen and the state?" (Pet. at 8 (emphasis in original).) This argument continues with the following statement:

> The important question that Petitioners bring to the Court's attention is, what is the legal effect of a Dallas Police Chief's decisions in connection with an IA investigation? In particular, to what extent, if any, does his decision to adopt the findings and recommendations of the IA Report constitute an official policy statement?

(*Id.* at 9.) And finally, Petitioners conclude that:

> Petitioners are not asking the Court to grant a writ of certiorari to write new law but, rather, to interpret the meaning of current law in a particular, but common, scenario – what is the legal significance of an IA report (containing findings and recommendations) adopted by a Police Chief. Because this scenario is a frequent one, the issue is one of importance and worthy of this Court's attention.

(*Id.* at 16.)

Petitioners have not alleged that the court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Nor have they alleged that the court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

To the extent the Petition can be construed as an argument that the court of appeals has decided an important question of federal law that has not been, but should

be, settled by this Court, which is one of the considerations for granting review contained in Rule 10, that argument fails. Petitioners ask this Court to hold that a municipal police chief's decision – following an internal investigation conducted *after* an incident in which a police officer allegedly violated *police department procedures* – that the officer did not violate those procedures is a ratification of the officer's conduct and thereby becomes an official policy of the municipality giving rise to municipal liability under 42 U.S.C. § 1983 for causing a *constitutional* violation. The important questions of federal law raised by Petitioners, however, have already been settled by this Court.

First, the Court has defined "municipal policy" in the context of municipal-liability claims brought under § 1983. *See, e.g., Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690-91, 694 (1978). Second, the Court has set out the standards for determining who is a policymaker. *See, e.g., City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988). Third, the Court's decisions require that a plaintiff establish a causal connection between the municipal policy and the asserted constitutional deprivation. *See, e.g., Board of the County Comm'rs v. Brown*, 520 U.S. 397, 400 (1997). And fourth, the Court has established that, before municipal liability under § 1983 can be imposed in cases involving a facially-lawful municipal policy, a plaintiff must show that the policymaker was deliberately indifferent to an obvious consequence that its action would result in constitutional violations. *See, e.g., Brown*, 520 U.S. at 407.

As shown below, the application of this Court's decisions to the questions presented by Petitioners establishes that a police chief's post-incident disciplinary decision is not a municipal policy under § 1983. The court of appeals

properly followed this Court's decisions in reaching its holding although, as the court of appeals' opinion reflects, it was only necessary to determine that Petitioners had failed to identify a municipal policy under *Monell* before affirming the summary judgment in favor of the City. (App. at 10.)

To be sure, Petitioners have failed not only to establish the existence of any of the reasons set forth in Rule 10 for granting a writ of certiorari, but also to present a legal basis for seeking, under the guise of presenting an "important" issue, to have this Court rewrite its well-established standards regarding liability of municipalities under 42 U.S.C. § 1983. The Court should therefore deny the Petition.

2. The Court of Appeals' Correctly Applied this Court's Precedents in Holding that Petitioners Failed to Identify a Municipal Policy that Caused a Constitutional Violation

a. The City's Policymaker Is the Dallas City Council

The court of appeals held that Petitioners failed to identify a municipal policy that caused a constitutional injury, (App. at 10), and therefore did not address Petitioners' argument that the City's Chief of Police is a policymaker or the City's response to that argument.[5] (*Id.*)

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[5] As previously noted, the magistrate judge stated that, even if Petitioners had identified an unconstitutional policy, they had not

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Because, however, Petitioners' argument to this Court is premised in its entirety on their assertion that the City's Chief of Police is a policymaker, Respondents address that issue here.

Petitioners allege that '[t]he City of Dallas has delegated policymaking authority to the Police Chief and/or Police Department under Chapter XII . . . of the Dallas City Charter. . . ." (Pet. at 6.) They further allege that the Police Chief is "the highest ranking and final authority for matters of DPD, and therefore Dallas, police procedures and policies. . . ." (*Id.*) In connection with their contention, Petitioners assert that "[f]or purposes of this petition, Police Chief Bolton *is* a policy-maker. The only issue here is, when are his acts 'policy' that bind the City of Dallas?" (*Id.* at 8 (emphasis in original).) Petitioners' position, even if only for purposes of this Petition, is simply incorrect.

The question of who is the policymaker of a municipality is one of state law. *Praprotnik*, 485 U.S. at 124. The authority to make municipal policy is necessarily the authority to make *final* policy. *Id.* at 127 (citation omitted).

As provided by the Dallas City Charter, all powers conferred on the City of Dallas, unless provided otherwise, are exercised by the City Council. Dallas City Charter ch. III, § 1. The Charter also provides for a council-manager form of government, wherein the City Manager is appointed by the City Council and is responsible for the proper administration of City affairs. *Id.* ch. VI, §§ 1, 2. The City Manager is subject to the supervision of the City

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shown that the City's department chiefs are policymakers. (Supp. App. at 22 n.13.)

Council and can be removed at the will and pleasure of the City Council by a two-thirds vote. *Id.* ch. VI, § 1.

Chapters VI and XII of the Charter provide that the Chief of Police be appointed by the City Manager and subject to the City Manager's supervision and control. *Id.* ch. VI, § 2; ch. XII, § 2. And, contrary to Petitioners' assertions, the Chief of Police does not have final authority over the discipline of Dallas police officers – the Charter provides for a review by the City Manager, and for appeal of the City Manager's decision to a civil service trial board. *Id.* ch. XII, § 4.

Under Texas law, the City's policymaker is the City Council, and it has not delegated policymaking authority to the Chief of Police. In addition, police department procedures and orders are not the policy of the City because they were not officially adopted and promulgated by the City Council.

b. Petitioners Have Not Identified a Municipal Policy

Petitioners argue that they raised a genuine issue of material fact in the district court as to whether the City is liable on the basis that it "ratified" the officers' conduct. (*See* Pet.) It must first be noted that Petitioners contend that the "ratification" is the Police Chief's decision, even though, as shown above, the Police Chief is not the City's policymaker. Second, Petitioners' argument completely ignores the requirement that municipal liability under § 1983 must be based on a municipal policy or custom. That requirement is one reason Petitioners have cited no cases to support their argument that an after-the-fact investigation establishes municipal policy. (*Id.*) Petitioners

do cite *Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649, 653 (5th Cir. 1994), for the definition of "ratification." *Prunty*, however, deals with "ratification" in the context of a suit against a private employer. *Id.* It is inapplicable to a § 1983 municipal-liability claim.

According to Petitioners, the Police Chief's adoption of DPD's post-incident internal investigation, insofar as the officers were found to have not violated DPD orders or procedures, became a municipal policy that the officers acted pursuant to and which could then serve as the basis for municipal liability under § 1983. (Pet. at 10-16.) The magistrate judge, in his recommendation that summary judgment be granted in favor of the City, appropriately characterized that argument as "circular" and correctly noted that it "obscures the fact that [Petitioners] seek to impose liability on the City for actions taken by individual police officers and paramedics on the scene." (Supp. App. at 20.) And, as the court of appeals held, this type of *respondeat superior* or vicarious liability cannot be imposed on the City in a claim under 42 U.S.C. § 1983. (App. at 10.) *See Monell*, 436 U.S. at 691, 694.

Since it is abundantly clear that no basis exists for municipal liability, Petitioners seek to expand, with no authority, this Court's rulings regarding the requirements for imposing municipal liability by including a new basis for liability – that the constitutionality of a written policy is not determined by what it says, but rather by what a plaintiff believes a municipal employee (not the policy-maker) has interpreted it to mean. (*See* Pet. at 11-13, 14-15.)

Petitioners contend that the Police Chief's "interpretations" of DPD orders and procedures, i.e., his decisions

concerning internal disciplinary complaints, become a body of municipal policies analogous to judicial case law. (*Id.* at 11.) Such fallacious reasoning is precisely why this Court has been so adamant that only a formal policy adopted by the municipality's policymaker or a persistent, widespread custom attributable to the policymaker can serve to impose municipal liability.

The Petition contains a long string citation ostensibly in support of Petitioners' contention that summary judgment in favor of the City was inappropriate because they have raised a genuine issue of material fact as to ratification. (Pet. at 13.) Petitioners first cite *City of St. Louis v. Praprotnik*, 485 U.S. at 127. The passage quoted by Petitioners, however, refers to ratification by the *authorized policymakers*, which, as shown herein, is the Dallas City Council, not the Chief of Police.

Hyland v. Wonder, 117 F.3d 405 (9th Cir. 1997), deals with the question of who is the policymaker in the City and County of San Francisco, California, and the delegation of policymaking authority there, and is totally inapplicable to those questions for Dallas, Texas. And while *David v. City and County of Denver*, 101 F.3d 1344, 1358 (10th Cir. 1997), also deals with policymaker questions in another state, the Tenth Circuit stated that any ratification that might exist would require action by the final policymaker. In the instant case, as has been pointed out numerous times, the final policymaker is the Dallas City Council, not the Chief of Police.

Petitioners quote from *Skevofilax v. Quigley*, 586 F. Supp. 532, 544 (D.N.J. 1984), as follows: " 'Where a municipality's procedure of reprimand is so inadequate as to ratify unconstitutional conduct, the municipality may

be liable under § 1983.'" (Pet. at 13 (quoting *Skevofilax*, 586 F. Supp. at 544).) Respondents note that the court in that case referred to a *procedure* of reprimand, not the existence or absence of reprimand in a particular situation. In addition, a continued reading of that case reveals that the court is referring to whether a failure to discipline or control officers for *previous* incidents in the face of knowledge of their propensity to commit violations can create a municipal custom. The court was not addressing an *after-the-fact* failure to discipline. Finally, Petitioners cite two district court cases that have no applicability here.

c. Petitioners Have Not Established a Causal Connection Between the Police Chief's Action and Their Alleged Constitutional Injury

Even if Petitioners have identified a municipal policy, they must also establish that there was a causal connection between that policy and their alleged constitutional deprivation. In *Board of the County Commissioners v. Brown*, this Court stated that "in enacting § 1983, Congress did not intend to impose liability on a municipality unless *deliberate* action attributable to the municipality itself is the 'moving force' behind the plaintiff's deprivation of federal rights." 520 U.S. at 400 (citing *Monell*, 436 U.S. at 694) (emphasis in original). The Court was concerned that failure to adhere to the rigorous requirements of culpability and causation in a § 1983 municipal-liability case would cause a collapse into *respondeat superior* liability. To prevent such an occurrence, "a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged." *Brown*,

520 U.S. at 410. Testing that link in this case shows that Petitioners' claims are, in fact, improperly based on *respondeat superior*.

Because Petitioners failed to identify a formal City policy, the lower courts correctly analyzed Petitioners' municipal-liability claim under the "custom or practice" standard. (App. at 10; Supp. App. at 19-20.) Under that standard, one such incident is insufficient to establish municipal liability. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985). Petitioners have failed to establish a claim for municipal liability based on an unlawful persistent, widespread practice attributable to the City's policymaker.

d. Petitioners Have Not Shown that the City's Policymaker Acted with Deliberate Indifference

If a plaintiff seeks to hold a municipality liable under § 1983 based on a municipal policy other than a formal, written policy that is unconstitutional on its face, the plaintiff must establish that the policymaker's action with respect to the policy was taken with deliberate indifference to an obvious consequence that its action would result in constitutional violations. *See Board of the County Comm'rs v. Brown*, 520 U.S. at 407 (1997). In this case, even if Petitioners have identified a municipal policy that caused them a constitutional injury (which Respondents deny), they have failed to show that the policymaker acted with deliberate indifference.

CONCLUSION

Petitioners' arguments fail to present a compelling reason for granting a writ of certiorari because the court of appeals correctly applied a properly stated rule of law to the summary judgment facts and reached the correct decision. Neither of the questions presented by Petitioners raises an important question of federal law that has not been, but should be, settled by this Court. Additionally, there is no conflict among the courts of appeals regarding any of the issues presented, and the court of appeals did not decide the case in a way that conflicts with relevant decisions of this Court. The Court should therefore deny the Petition for Writ of Certiorari.

Respectfully submitted,

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